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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 337

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF APPELLANT.

EDWARD C. TURNER,
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Counsel for Appellant.

Columbus, Ohio.
February 27, 1934.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 608.

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF APPELLANT.

OPINION BELOW.

This is an appeal from the Supreme Court of Ohio, whose opinions are reported in 127 Ohio St., 109 (187 N. E., 7), and also appear at page 50, et seq., of the record.

Opinion Below.

The opinions of the Public Utilities Commission are reported in P. U. R., 1933A, 337, and also appear at page 142, et seq., of the record.

The dissenting opinion of Judge Jones of the Ohio Supreme Court, discussing briefly three of our principal questions, follows (R., 73):

> "Jones, J., dissenting. On the eve of adjournment there is not time to amplify one's views in these cases, but I wish to say that this case is more far reaching in its tendencies than any other reported case that has come to my attention. Briefly stated, I dissent from the legal principles here announced for various reasons, among which are the following:
>
> Although the commission made a partial allowance therefor, the majority decision permits no allowance for depletion or amortization of utilities in cases such as these, where the annual drain upon their gas field resources by way of gas depletion is so heavy, eventually amounting to total exhaustion. Such a decision, in my judgment, where a low rate is fixed, tends to pure confiscation of property.
>
> The decision, by considering book values as a basis of valuation, in face of overwhelming expert testimony establishing higher values, is, in that respect, erroneous.
>
> The disallowance for delayed rentals and of valuation for the gas reserve leases, which are designated as 'Class No. 2,' is, in my judgment, erroneous. 'Class No. 2' is used and useful as a reasonable reserve gas property, and should have been given a reasonable valuation. The theory advanced that a tract held in reserve may be capitalized only if and when it is being actually operated is obviously unsound. It might as well be argued that

a set of steam boilers, held in reserve for unforeseen contingencies but not presently operated, should not be valued until they were being put into actual use. The utility's gas territory is its chief and necessary asset; its extent being measured by the requirement of all the communities which it is called upon to serve and the reasonable cost of service should be allocated among them. This utility is required to and does provide for the needs of the public in many sections of the state. In view of the short period of life which the commission found that 'Class No. 1' (the tract being actually operated) had, and especially in view of longer periods of municipal franchises which the utility may be compelled to fulfill, a reasonable valuation for Gas Tract No. 2 held in reserve should have been allowed; otherwise no long-term public franchise contract could be safely entered into, either by the utility or the municipality. Because of the peculiar hazards of the business and of inevitable gas exhaustion resulting in so short a period as that found by the commission (being presently three years and two months), ordinary business sense would require a reasonable gas tract reserve, in addition to the tract that is being actually operated, in order to supply the public's future needs. That situation, which is now so evident, did not so clearly appear when we decided the case of **Logan Gas Co. v. Public Utilities Commission**, 121 Ohio St., 507, 169 N. E., 575."

JURISDICTION OF THE COURT.

Appellant has complied with paragraph 1 of Rule 12. Probable jurisdiction noted December 18, 1933. (290 U. S., ...)

STATEMENT.

Since 1924 appellant has neither earned nor paid a dividend. (R., 679.)

The average income for 15¾ years preceding December 31, 1929, on the outstanding capital stock of appellant amounted to 2.92%. (R., 678.) (Co. Ex. 16, R., 2896.)

For the years 1927, 1928 and 1929 appellant sustained a net deficit of $154,188.07. (R., 680.) (Co. Ex. 17, R., 2897.)

On September 3, 1929, the city council of Columbus, Ohio, passed an ordinance fixing the maximum price which might be charged for natural gas delivered in said city for a period of five years from November 12, 1929, at 48 cents per M c. f., with 75 cents per month minimum charge.

At the time of the passage of said ordinance the average rate for natural gas throughout Ohio was 63.8 cents per M c. f. (R., 688; 673), while the average rate throughout the United States was 62 cents per M c. f. (R., 687.)

Appellant duly filed its complaint and appeal in respect of said ordinance with the Public Utilities Commission of Ohio, a non-judicial body.

After extended hearings, the Public Utilities Commission found that 55 cents per M c. f., with a 75 cents monthly minimum charge, was a proper rate, and substituted that rate for the original ordinance rate. (R., 187.) Appellant's application for rehearing was overruled. (R., 266.)

Appellant duly filed its petition in error in the Supreme Court of Ohio, complaining, inter alia, that the 55 cent rate fixed by the Public Utilities Commission of Ohio was repugnant to the Constitution of the United States in that it deprived appellant of its property without due process of law, denied to appellant the equal protection of the law and impaired the obligation of two contracts. (R., 1.)

The city of Columbus also filed its petition in error in the Supreme Court of Ohio, claiming that the 55 cent rate found by the commission and substituted for the ordinance rate was unlawful and unreasonable. (R., 36.)

The Supreme Court of Ohio consolidated said cases. There was and is but a single record. (R., 271.)

The court below denied appellant any relief, but did reverse the commission, holding that the ordinance rate of 48 cents was neither unlawful, unreasonable nor confiscatory. (R., 72.)

Appellant duly made application to the Supreme Court of Ohio for a rehearing. Said application for rehearing was based upon appellant's claim there made, and here renewed, that the court's construction of the Constitution and statutes of Ohio rendered the same repugnant

to the Constitution of the United States, particularly Section One of Article Fourteen of the articles in addition to and amendment of said Constitution. Said application for rehearing was appellant's first opportunity to raise certain questions under the federal Constitution in addition to the federal questions raised before the commission and in appellant's petition in error filed in the Ohio Supreme Court. (R., 75.)

Appellant is here complaining of the deprivation of its property without due process of law and the impairment of the obligation of two contracts through

(1) The failure of the Supreme Court of Ohio to grant appellant relief from the action of the Public Utilities Commission of Ohio, which found that a rate of 55 cents per M c. f., with a 75 cent minimum charge, was a just and reasonable charge for natural gas delivered to consumers in the city of Columbus, Ohio.

(2) The holding by the Supreme Court of Ohio that the rate of 48 cents per M c. f., with a 75 cent minimum charge, as fixed by an ordinance of the city of Columbus, from which ordinance an appeal was taken to the Public Utilities Commission of Ohio was neither unreasonable, unlawful nor confiscatory.

The difference between the 55¢ rate and the 48¢ rate is due to the elimination of the commission's allowance for depletion on part of the Ohio production property and to the reduction of operating expenses and return on the out of state property.

Statement.

In arriving both at the valuation of the rate base and the rate of return to be allowed thereon, judicial notice was taken of the depression which followed the 1929 date certain.

No notice, however, was taken of the inevitable fact that in times of depression sales decrease.

Both the 55¢ rate and the 48¢ rate above referred to were determined upon the assumption that the 1929 sales level would continue throughout the depression. In other words, the gas rate was determined by dividing the operating expenses and return by the 1929 sales.

Corporate Development and Relationship.

Appellant, The Columbus Gas & Fuel Company, was incorporated in Ohio on February 23, 1906, since which time it has operated as a public utility supplying natural gas in the city of Columbus and immediate vicinity. (All rates outside of the city are higher than the rates in Columbus [R., 679].)

Originally it had its own gas supply, but this became exhausted in 1914. It then entered into a contract with The Ohio Fuel Supply Company (Co. Ex. 12) for a twenty years' supply of natural gas. These companies were in no way related.

This contract provided (R., 2886):

> (Fifth.) That the supply company, in addition to drilling for gas and to building and maintaining compressor stations, gathering lines and other facilities necessary to produce and deliver the gas,

would "obtain and develop new gas leases and contracts for gas when the same become necessary in order to enable it to deliver gas under the terms of this contract,".

The supply company could sell its entire property only subject to the contract.

A flat price was fixed in the contract for the first ten years' supply. After the first ten years the supply company was to get 65 per cent. of the rates charged by the Columbus company, subject to the following proviso in Item Sixth (R., 2889):

> "It is mutually understood and agreed with respect to the price above stated to be charged for natural gas after the expiration of the first ten (10) years of this contract, that the same is based upon the estimated cost to the party of the first part obtaining said gas from its present sources of supply, and that in case after the expiration of said ten year period the party of the first part finds it necessary to resort to other sources of supply, so that its supply available for delivery hereunder is obtained by it at an increased average cost per thousand cubic feet more than a proportionate increase in the rate which said Columbus company receives at the time for said gas supplied under this contract, then and in that event said Ohio and Columbus companies shall endeavor to secure a rate satisfactory to both companies, and upon their failure to obtain the same the said Ohio company shall have the right to cancel and annul this contract to take effect twelve months after the giving of said notice."

Down to 1924 the Columbus company and the city of Columbus agreed upon rates. (R., 2982.) The expira-

tion of the 1921 rate ordinance was fixed to be contemporaneous with the expiration of the first ten year term of the supply contract. That ordinance fixed a sliding scale of rates from 45¢ to 65¢. (Co. Ex. 98, R., 2982.) The 1924 negotiations for an acceptable rate failed. The city council passed and the company contested in the District Court a reduction of rate to 40¢.

The Ohio Fuel Gas Company is engaged in the production and transportation of natural gas throughout Ohio. On November 5, 1924, this company, which had been incorporated in Ohio on December 15, 1922, and which had succeeded to the property of The Ohio Fuel Supply Company subject to the Columbus company's contract, adopted a resolution (Co. Ex. 74) authorizing the cancellation of the Columbus company's contract according to the terms thereof in the event of the failure of the Columbus company to secure relief by judicial or other revisory action against the provisions of the 1924 ordinance. (R., 2950.)

The District Court, specifically assuming the gate price to be 65 per cent. of the retail rate, fixed a rate of 48 cents, which expired in 1929. No investigation was made of the gate price. **(The Columbus Gas & Fuel Company v. City of Columbus,** 17 Fed. [2d], 630, 55 Fed. [2d], 156.)

On September 30, 1926, Columbia Gas & Electric Corporation was incorporated under the laws of Delaware. This corporation is not to be confused with the Columbia Gas & Electric Company, a West Virginia natural gas

producing company which disposed of its property and went out of business about this same time. Columbia Gas & Electric Corporation is a holding company, and had acquired the voting stock of The Ohio Fuel Gas Company, the successor of The Ohio Fuel Supply Company, and the voting stock of United Fuel Gas Company, a West Virginia natural gas producing company, whose rates were the subject of litigation in this court as reported in the 278 U. S., pp. 300 and 322.

The record discloses an economic necessity for a supply of natural gas backed by adequate gas reserves. It was shown to be the history of companies that failure had followed the exhaustion of their original gas fields because of the lack of gas reserves. (R., 1052.)

In 1927, during the pendency of the 1924 rate case in the Federal Court, Columbia Gas & Electric Corporation purchased the voting stock of The Columbus Gas & Fuel Company.

For the purpose of settling both the litigation and the natural gas rate, the city council of Columbus passed on June 3, 1929, and the Columbus company accepted on June 17, 1929, Ordinance No. 410-29 (R., 2983), commonly known as the "65 cent ordinance," which provided a sliding scale for natural gas from January 1, 1930, of 55¢-60¢-65¢ per thousand cubic feet, with a minimum charge of 75 cents per month. Upon the passage and acceptance of said 65 cent ordinance, The Columbus Gas & Fuel Company and The Ohio Fuel

Gas Company entered into a new supply contract (Co. Ex. 11, R., 2879) fixing a gate price of 45 cents per M c. f., which price was based upon the increased costs of production. (R., 668.)

Thereafter the city council repealed the 65¢ ordinance and passed a 53¢ ordinance (R., 2983;), which was defeated on referendum. Thereupon the 48¢ ordinance was adopted. (R., 2984.)

So that the corporate history may be complete, mention is here made of Columbia Engineering & Management Corporation, since dissolved. As the allowance for the fees of this corporation were reduced to less than cost by the Public Utilities Commission, and no complaint of such action is here claimed, no further attention will be given this company.

Treatment on Account of Inter-Corporate Relations.

The company introduced its evidence under the theory that

> "common ownership is not of itself sufficient ground for disregarding such inter-corporate agreements when it appears that although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere." **(United Fuel Gas Co. v. R. R. Commission**, 278 U. S., 300-320).

And

> The ownership by Columbia Gas & Electric Corporation of the capital stock of The Columbus Gas &

Fuel Company did not destroy the distinct corporate identity of the Columbus company. **(Smith v. Illinois Bell Tel. Co.**, 282 U. S., 133-144.)

After introducing the valuation, operating expenses and other data pertaining to the distribution property of The Columbus Gas & Fuel Company, the fairness of the contract under which natural gas was supplied to the Columbus company was established, as will be more fully shown under the heading "The Contracts Between Related Companies."

Appellant introduced the valuation and operating expense data of The Ohio Fuel Gas Company, which supplied gas to appellant, and of United Fuel Gas Company, from which The Ohio Fuel Gas Company purchased under contract approximately 29 per cent. of its supply for 1929.

Ford, Bacon & Davis, Inc., a nationally known appraisal firm, had made a valuation of The Ohio Fuel Gas Company property as of December 31, 1929. This was brought into the instant case by subpoena, and the city was given the right to and did cross examine all valuation and other witnesses. (R., 134.)

The operating expenses and various other data were brought in by subpoenaing officers of The Ohio Fuel Gas Company. (R., 134.)

A rate case was pending before the Public Service Commission of West Virginia involving all of the property valuation and operating expenses of United Fuel

Gas Company. A transcript of all of the testimony, exhibits, findings, etc., of the West Virginia rate case, including the opinion of the Supreme Court of Appeals, was introduced by order of the Ohio commission (R., 141) in the instant case and witnesses produced for cross examination.

The commission ignored the contract (Co. Ex. 58; R., 2915) between the Ohio and West Virginia companies and proceeded to fix a river price for the West Virginia gas to be allowed as a part of the Columbus gate price. Appellant had no dealings with the West Virginia company.

The commission also ignored the contract (Co. Ex. 11; R., 2879) between the Columbus company and The Ohio Fuel Gas Company for the Columbus company's supply of gas at the city gate.

The commission treated the companies as separate entities, making an allowance in operating expenses of the Columbus company for the gate price found and making a similar allowance in operating expenses of the supply company for the gas purchased at the Ohio river.

Whether the Supreme Court of Ohio disregarded corporate entities or followed the commission's treatment is not clear from the court's opinion, but the court did totally ignore the river contract between The Ohio Fuel Gas Company and United Fuel Gas Company for the West Virginia gas and the gate price contract between The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company for the Columbus company's supply.

However, both the commission and the court below were "imposing its requirements upon a corporate organization (appellant company) engaged in an intrastate public service, and, as such, amenable to a valid exercise of the commission's authority." **(Smith v. Illinois Bell Tel. Co.**, 282 U. S., 140.)

No attempt was made to hide behind the contracts. No attempt will be made here to hide behind the contracts, but it will be respectfully insisted that all of the evidence does establish that the contracts were fair and did not unduly siphon any profits out of the regulated company. It will therefore be contended not only that the obligations of the contracts were impaired, but that by refusing to allow either the contract price or a fair price as a part of appellant's operating expense for purchased gas, appellant was deprived of its property without due process of law.

It will be contended further that neither the commission nor the court had the right to reduce appellant's operating expenses through the device of disregarding the contract price paid by The Ohio Fuel Gas Company to United Fuel Gas Company for West Virginia gas delivered to The Ohio Fuel Gas Company. The failure to allow either the contract price or a fair market price for this gas results in the confiscation of appellant's property without due process of law.

After an investigation of the operating expenses and valuation of both The Ohio Fuel Gas Company, which produces and transports natural gas throughout Ohio,

and United Fuel Gas Company, which produces gas in West Virginia and Kentucky and transports and delivers it to The Ohio Fuel Gas Company at the West Virginia side of the Ohio river, the commission fixed a gate price of 39.02 cents (Sheet 1, Exhibit "B"; R., 179) to be allowed as a part of appellant's operating expenses; while for the same purpose the court below approved the finding of the minority commissioner (Sheet 1, Exhibit "B"; R., 216) which allowed a gate price of 31.70 cents.

The difference between these two gate prices is due to two facts:

(1) While the majority of the commission made an allowance for the depletion (called amortization) of gas leaseholds and gas wells, the minority made no such allowance.

(2) While the majority of the commission followed the operating expenses allowed by the Pubic Service Commission of West Virginia in respect of the West Virginia company's property in fixing a river price to be allowed to The Ohio Fuel Gas Company for gas purchased from United Fuel Gas Company at the Ohio river, the minority deducted from such operating expenses the allowances for amortization and lease rentals. In other words, while the majority of the commission followed the law of West Virginia as to property located in that state, the minority commissioner and the court below applied their interpretation of Ohio law thereto.

In reversing the commission, the court below held that

under Ohio law no allowance in operating expenses might be made for any of the following:

(1) The depletion of natural gas fields, wells or equipment.

(2) Amortization of facilities used in producing and transporting natural gas.

(3) Rentals paid on reserve leaseholds.

In addition to failing to consider any of the foregoing expenses of The Ohio Fuel Gas Company in arriving at a Columbus gate price, the court below approved an inadequate annual depreciation allowance for both The Ohio Fuel Gas Company and The Columbus Gas & Fuel Company, in addition to failing to give recognition to the full amount of other operating expenses incurred by both companies.

The court below also ordered the commission in arriving at a gate price to be allowed to appellant for gas purchased from The Ohio Fuel Gas Company to apportion the expenses of The Ohio Fuel Gas Company's production and transmission systems according to a demand-mileage allocation.

The court below further held that, in ascertaining the valuation of The Ohio Fuel Gas Company's property

(1) Market value of the operated leaseholds should be disregarded.

(2) No value of any kind should be allowed for reserve gas leaseholds.

(3) No going concern value should be allowed.

(4) The present value of gas well construction and

equipment should be arrived at by deducting from the reproduction cost new a percentage based upon the remaining gas content of the gas field,

(5) No value allowed for work in progress—incomplete construction.

(6) No value allowed for cost of organization.

(7) No value allowed for cost of financing, which was shown to have been an expense necessarily incurred in the reproduction of the property. (R., 1659; 2733; 2735; 2754; 2758.)

(8) General overheads should be reduced to 14%, which under the circumstances of this case is unreasonably low.

(9) The allowance for working capital, materials and supplies should be reduced to $1,700,000, rather than the customary allowance of 5% of the rate base, which would amount to at least $3,541,214. (R., 200.)

(10) The valuation thus arrived at should be apportioned to Columbus under a theoretical and arbitrary method of allocation which the evidence shows and which the commission unanimously found to be impossible of application.

The court below further held that in ascertaining the value of appellant's distribution system in the city of Columbus

(1) A gas holder actually in use should be eliminated. (R., 2513.)

(2) Labor costs should be reduced below the company's experience and the prevailing labor rates. (R., 2491; Co. Ex. 199.)

(3) Labor performance should be raised above not only the company's experience but the experience of all other construction work similar in character in the city of Columbus. (R., 2491; Co. Ex. 199.)

(4) Going concern value should be eliminated. (R., 171.)

(5) The allowance for working capital, materials and supplies should be reduced to $100,000, rather than the customary allowance of 5% of the rate base, which would amount to at least $186,382. (R., 209.)

(6) General overheads should be reduced to 12½%.

(7) No allowance should be made for cost of financing which would be necessarily incurred in reproducing the property. (R., 1659; 2733; 2735; 2754; 2758.)

In computing operating expenses other than gate rate to be allowed appellant:

1. An insufficient allowance was made for taxes.

2. Expenses actually incurred for load building were disallowed.

3. The expense of collar leak clamps was disallowed.

4. While the city conceded a depreciation allowance of $97,533.50, the court below approved a reduction of this allowance to $68,196.00. (R., 160; 220.)

The court below further held that in ascertaining the operating expenses and valuation of the property of United Fuel Gas Company, which so far as this case is concerned does no business in Ohio and whose property in question is located outside of Ohio, should be found and valued according to the laws of the state of Ohio and

in disregard of the laws of the state where the natural gas is produced and the company regulated. (R., 51.)

The court below held that in calculating the gate rate to be allowed appellant, The Ohio Fuel Gas Company should be allowed a return of not more than 6½% on that part of its property considered in the rate base, with an annual allowance of only 2½% for depreciation, and with no allowance for depletion, amortization, lease rentals, surplus or contingencies, and with an insufficient allowance for taxes.

While the Public Service Commission of West Virginia in the rate case introduced in the instant case had allowed an 8% return on the value of United Fuel Gas Company's property (R., 2964), which was afterwards reduced for temporary rate purposes to approximately 7.25% (City Ex. 76), the court below approved a reduction of this return to 6½%, with omissions similar to those of the Ohio Fuel above noted.

The court below approved a rate of return to appellant of 6½% on the allowed value of its property, with no allowance for contingencies or surplus and with a reduced allowance below actual necessary expenditures for operating expenses and taxes.

While the city conceded an annual depreciation charge on the property of The Ohio Fuel Gas Company at the rate of 3.6% per year, amounting to $2,848.301.74 (R., 160), the court below approved a reduction of this allowance to $1,765,607. (Sheet 1, Minority's Exhibit "B"; R., 217.)

The terms gate "rate" and river "rate" have been used frequently throughout this case. These terms refer to the items of purchased gas expense for appellant at the Columbus gate and for the Ohio Fuel at the Ohio river. The commission did not claim and did not possess the power to fix a river or a gate "rate". (R., 147.)

St. Clairsville v. P. U. C. O., 102 O. S., 574;
West Ohio Gas Co. v. P. U. C. O., 42 Fed. (2d), 899.

The statutes referred to will be set out in an appendix.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

Deprivation of property without due process of law and the impairment of the obligations of two contracts in violation of Section One of Article Fourteen of the articles in addition to and amendment of the Constitution of the United States, and Section Ten of Article One of the Constitution of the United States through

The failure of the Supreme Court of Ohio to grant appellant relief from the action of the Public Utilities Commission of Ohio, which found that a rate of 55 cents per M c. f., with a 75 cent minimum charge, was a just and reasonable charge for natural gas delivered to consumers in the city of Columbus, Ohio. (Assignment [1], R., 111.)

The holding by the Supreme Court of Ohio that the rate of 48 cents per M c. f., with a 75 cent minimum charge, as fixed by an ordinance of the city of Columbus,

from which ordinance an appeal was taken to the Public Utilities Commission of Ohio, was neither unreasonable, unlawful nor confiscatory. (Assignment [2], R., 111.)

The failure of the court below to hold that Sections 4 and 5 of Article XVIII of the Constitution of Ohio, and Sections 614-46, 499-8, 499-9, 499-13, 614-49 and 614-50 of the General Code of Ohio, as interpreted by the court, are invalid because contrary to the provisions of Section One of Article Fourteen of the articles in addition to and amendment of the Constitution of the United States. (Assignment [6], R., 118.)

The specific errors to be urged as the cause of the above violations of the Constitution of the United States are:

I. Confiscation of property due to failure to allow in operating expenses either the contract price, a fair market price, or a reasonable price for the natural gas which appellant must purchase at the city gate because of (Assignment [3], R., 112):

A. Disallowance of operating expense reasonably and necessarily incurred in producing and transporting natural gas to the Columbus gate, to wit:

(1) No allowance for depletion of natural gas fields, wells and/or equipment (Assignment [5d], R., 113.)

(2) No allowance for amortization of facilities used in producing and transporting natural gas. (Assignment [5d], R., 113.)

(3) No allowance for delay rentals paid on gas leaseholds. (Assignment [5c], R., 113.)

(4) Insufficient allowances for taxes and depreciation. (Assignments [5m, 5l], R., 114.)

(5) Disregard of the contract for the purchase of natural gas from United Fuel Gas Company, a corporation in the state of West Virginia, and subject to the jurisdiction of the Public Service Commission of that state, and holding that the property of such company should be valued, its expenses found and allocation made in accordance with Ohio law, notwithstanding that said company, so far as this case is concerned, owns no property and does no business in Ohio, and that the applicable Ohio law as interpreted by the court below conflicts with the applicable West Virginia law as interpreted by the highest court of that state, resulting in a less than fair market price as established by similar sales to unrelated companies. (Assignments [5o to v], R., 115-116.)

(6) Holding that a theoretical and arbitrary method of allocating the expense of The Ohio Fuel Gas Company should be used in ascertaining the Columbus gate rate, notwithstanding the evidence shows and the commission unanimously found that such method of allocation was impossible of application. (Assignment [5n], R., 115.)

B. Failure to find a fair value of the property used and useful in producing and transporting natural gas to the Columbus gate, because:

(1) Competent and undisputed evidence of market value of operated leaseholds was disregarded and book value only allowed. (Assignment [5b], R., 113.)

(2) No value of any kind was allowed for reserve gas leaseholds. (Assignment [5-a], R., 113.)

(3) No going concern value was allowed. (Assignment [5-h], R., 114.)

(4) The present value of gas well construction and equipment was arrived at by deducting from the reproduction cost new a percentage equal to the estimated depletion of the gas field. (Assignment [5-e], R., 113.)

(5) No value was allowed for work in progress, including incomplete construction. (Assignment [5-k], R., 114.)

(6) No value was allowed for cost of organization. (Assignment [5-f], R., 114.)

(7) No value was allowed for cost of financing, which was shown to have been necessarily incurred in the reproduction of the property. (Assignment [5-g], R., 114.)

(8) Insufficient allowance for general overheads. (Assignment [5-i], R., 114.)

(9) Insufficient allowance for working capital, materials and supplies. (Assignment [5-j], R., 114.)

(10) The court below held that the valuation thus arrived at should be apportioned to Columbus under a theoretical and arbitrary method of allocation which the evidence shows and the commission unanimously found to be impossible of application. (Assignment [5-n], R., 115.)

C. Inadequate rate of return allowed. (Assignment [4], R., 112.)

II. Confiscation of property due to:

A. Failure to find a fair value of appellant's distribution system because:

(1) No value was allowed for a gas holder actually used. (Assignment [5-x], R., 116.)

(2) Labor costs were reduced below the company's experience and the prevailing labor rates. (Assignment [5-w], R., 116.)

(3) Labor performance was raised above not only the company's experience but the experience of all other construction work similar in character in the city of Columbus. (Assignment [5-w], R., 116.)

(4) Going concern value was eliminated. (Assignment [5-y], R., 116.)

(5) An insufficient allowance was made for working capital, materials and supplies. (Assignment [5-bb], R., 116.)

(6) General overheads were reduced to 12½%. (Assignment [5-aa], R., 116.)

(7) No allowance was made for cost of financing, which the evidence showed to be necessarily incurred in reproducing the property. (Assignment [5-z], R., 116.)

B. Disallowance of operating expenses, other than gate price, reasonably and necessarily incurred by appellant, to wit:

(1) Insufficient allowance for taxes. (Assignment [5-dd], R., 117.)

(2) Expenses actually incurred for load building were disallowed. (Assignment [5-ee], R., 117.)

(3) The expense of collar leak clamps was disallowed. (Assignment [5-hh], R., 117.)

(4) Insufficient allowance for depreciation. (Assignment [5-cc], R., 117.)

III. Confiscation of property, due to inadequate rate of return, (Assignment [4], R., 112) because:

(1) After reducing both the rate base and the rate of return on the assumption that a depression was to follow, the price of the utility's product or service was arrived at by assuming that the prosperity level of sales would continue.

(2) A 6½% return on a very low valuation, with no allowance for contingencies and/or surplus, with no allowance for depletion for wasting assets, with no allowance for the amortization of any of the facilities of a limited life business, and with an allowance of only 1½% of the present value of the depreciable property for depreciation, does not constitute a fair return on the value of a property used in so hazardous an undertaking as the production, transmission and/or distribution of natural gas. Such return neither assures nor permits confidence in the financial soundness of the utility and is inadequate, under efficient and economical management, to maintain and support the utility's credit and to enable the utility to raise the money necessary for the proper discharge of its public duties.

(3) As no allowance was made in the gate price for lease rentals, increased taxes, depletion and/or amortization, appellant will sustain an operating deficit.

Specification of Assigned Errors.

IV. The impairment of the obligations of two contracts:

(1) The gate price contract (Co. Ex. 11; R., 2879) between The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company for the Columbus company's gas supply. (Assignment [9], R., 118.)

(2) The river price contract between United Fuel Gas Company of West Virginia and its related companies, including The Ohio Fuel Gas Company (Co. Ex. 58; R., 2915), for gas from West Virginia. (Assignment [10], R., 119.)

V. Denial of due process because appellant was not accorded that sort of judicial inquiry to which under the Fourteenth Amendment and the decisions of this court it was entitled. (Assignment [7], R., 118.)

ARGUMENT.

Outline.

Our argument will be presented in the following order:

I. A to C. The gate price paid by appellant to The Ohio Fuel Gas Company for gas delivered at the Columbus gate.

II. A and B. Appellant's valuation and operating expenses other than the gate price.

III. The rate of return.

IV. A and B. The contracts involved.

V. Due process.

VI. Table showing effect of claimed allowances on gas rate.

Our argument will apply equally whether the properties and expenses of the natural gas producing and transporting companies be considered as separate units or as a single unit of which appellant is a part. This for the reason that the valuation and expenses of the supply companies must be found and apportioned to the city of Columbus under any method of allocation or rate-making.

Summary.

I. Appellant complains of confiscation because in computing the rate which it may charge for natural gas delivered to consumers in the city of Columbus, it was

not allowed in operating expenses either the contract price, a fair market price, or a reasonable price for the natural gas which it must purchase at the city gate.

A. In arriving at the gate price to be paid by appellant to The Ohio Fuel Gas Company, the court below held that no allowance should be made for any of the following items of operating expense reasonably and necessarily incurred in producing and transporting natural gas to the Columbus gate, to wit:

(1) Depletion of natural gas fields, wells and/or equipment.

(2) Amortization of facilities used in producing and transporting natural gas.

(3) Delay rentals paid on gas leaseholds.

(4) In addition to the failure to allow anything for any of the foregoing, there were insufficient allowances for taxes and depreciation. The city conceded that the annual depreciation allowance should be $2,848,301.74, while the court below approved the allowance of only $1,765,607.00.

(5) A portion of the gas used in Ohio is purchased by The Ohio Fuel Gas Company at the state line from United Fuel Gas Company, a related West Virginia company, which company is subject to the jurisdiction of the Public Service Commission of West Virginia. In arriving at the operating expenses of The Ohio Fuel Gas Company the court below disregarded entirely the contract between the companies (Co. Ex. 58; R., 2915) and held that the property of such West Virginia company

should be valued, its expenses found, and allocation made in accordance with Ohio law, notwithstanding that the applicable Ohio law as interpreted by the court below conflicts with the applicable West Virginia law as interpreted by the highest court of that state where the property is located, resulting in a less than fair market price as established by similar sales to unrelated companies.

(6) The court below held that a theoretical and arbitrary method of allocating the expenses of The Ohio [illegible] Company should be used in ascertaining the [illegible] price, notwithstanding the evidence shows [illegible] ion unanimously found that such method [illegible] s impossible of application.

[illegible] ct of the valuation of the property of The Ohio [illegible] Gas Company used and useful in producing and transporting natural gas to the Columbus gate:

(1) Competent and undisputed evidence of market value of operated leaseholds was disregarded and book value only allowed.

(2) No value of any kind was allowed for reserve gas leaseholds.

(3) No going concern value was allowed.

(4) The present value of gas well construction and equipment was arrived at by deducting from the reproduction cost new a percentage equal to the estimated depletion of the gas field, which resulted in a reduction of $10,387,311 from the cost of reproduction new less observed depreciation.

(5) No value was allowed for work in progress, including incomplete construction.

(6) No value was allowed for cost of organization.

(7) No value was allowed for cost of financing, which was shown to have been necessarily incurred in the reproduction of the property.

(8) General overheads were reduced to 14%, which under the circumstances of this case is unreasonably low.

(9) The allowance for working capital, materials and supplies was reduced to $1,700,000 from the customary allowance of 5% of the rate base which would amount to at least $3,541,214.

(10) The court below held that the valuation thus arrived at should be apportioned to Columbus under a theoretical and arbitrary method of allocation which the evidence shows and the commission unanimously found to be impossible of application.

C. A 6½% rate of return is wholly inadequate for The Ohio Fuel Gas Company and United Fuel Gas Company, which are engaged in the production and transmission of natural gas. (The general subject **"Rate of Return"** will be argued under III below.)

II. A. In the valuation of appellant's distribution system, confiscation is complained of because:

(1) No value was allowed for a gas holder actually used.

(2) Labor costs were reduced below the company's experience and the prevailing labor rates.

(3) Labor performance was raised above not only the company's experience but the experience of all other construction work similar in character in the city of Columbus.

(4) Going concern value was eliminated.

(5) The allowance for working capital, materials and supplies was reduced to $100,000 from the customary allowance of 5% of the rate base, which would amount to at least $186,382.

(6) General overheads were reduced to 12½%.

(7) No allowance was made for cost of financing, which the evidence showed to be necessarily incurred in reproducing the property.

B. In the allowance to appellant for operating expenses other than the gate price, confiscation is complained of because:

(1) An insufficient allowance was made for taxes.

(2) Expenses actually incurred for load building were disallowed.

(3) The expense of collar leak clamps was disallowed.

(4) While the city conceded a depreciation allowance of $97,533.50, the court below approved a reduction of this allowance to $68,196.00.

III. As to **rate of return**, confiscation is complained of because:

(1) Where, after reducing both the rate base and the rate of return on the assumption that a depression is to follow, the price of the utility's product or service is

arrived at by assuming that the prosperity level of sales will continue, confiscation is bound to result.

(2) The allowance of 6½ per cent. as a rate of return on a very low valuation, with no allowance for contingencies and/or surplus, with no allowance for depletion for wasting assets, with no allowance for the amortization of any of the facilities of a limited life business, and with an allowance of only 1½ per cent. of the present value of the depreciable property for depreciation, does not constitute a fair return on the value of a property used in so hazardous an undertaking as the production, transmission and/or distribution of natural gas. Such return neither assures nor permits confidence in the financial soundness of the utility and is inadequate, under efficient and economical management, to maintain and support the utility's credit and to enable the utility to raise the money necessary for the proper discharge of its public duties.

(3) As no allowance was made in the gate price for lease rentals, increased taxes, depletion and/or amortization, appellant will sustain an operating deficit.

IV. Contracts. Appellant complains of the impairment of the obligations of two contracts:

(1) The gate price contract (Co. Ex. 11; R., 2879) between The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company for the Columbus company's gas supply. If the contract between The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company (Co. Ex. 11, R., 2879) be found to be fair, then all other ques-

tions herein, except questions pertaining to the valuation, expenses and return of appellant in respect of its distribution property, will become moot.

(2) The river price contract between United Fuel Gas Company of West Virginia and its related companies, including The Ohio Fuel Gas Company (Co. Ex. 58; R., 2915), for gas from West Virginia, which contract conformed to the holdings of the Supreme Court of Appeals of West Virginia (95 W. Va., 91), the District Court for the Southern District, West Virginia (14 Fed. [2d], 209; affirmed on other points, 278 U. S., 322), and various holdings of the Public Service Commission of West Virginia.

V. Due process. Appellant complains that it was not accorded that sort of judicial inquiry to which under the Fourteenth Amendment and the decisions of this court it was entitled.

VI. Table showing the effect on rate if any of the contended for items are restored.

I. A (1) and (2) DEPLETION—AMORTIZATION.

The most recent discussion of "Depletion" by this court is to be found in the Income Tax Cases decided Jan. 15, 1934. (Helvering v. Falk, No. 225; Reynolds v. Cooper, 227 to 229; 290 U. S., ...)

In reviewing the holding of the court below in the instant case, the **Yale Law Journal** in its January, 1934, issue, at page 483, says:

> "Regulation of the rates of natural gas utilities is complicated by the consideration that since they exploit a wasting asset they do not, in theory, contemplate a perpetual life. The service life not only of the production but also of the transmission properties is limited by the life of the gas fields from which the company draws its supply. Difficulties inherent in accurate predicton of this life have induced some commissions to dispose of the problem summarily by permitting such utilities to earn an unusually high rate of return. But precision demands that the income be resolved into its elements. The company is entitled to earn, in addition to a fair return and a fair allowance for depreciation and current maintenance, an amount sufficient within the probable life of the business to repay the investor the entire capital investment less salvage at the end of its present use.
>
> In a recent case the Supreme Court of Ohio revealed an unfortunate lack of comprehension of these problems."

In arriving at the 55 cent rate, the majority of the commission made no allowance for amortization as such but did make an allowance for depletion (which they

called amortization) on three accounts: 205—leaseholds, 211—gas well construction and 212—gas well equipment, in the sum of $4,158,954.00. (Majority Opinion, R., 161.) They also allowed a depreciation rate of 1½ per cent. on other depreciable property than said Accounts 205, 211 and 212 which amounted to $667,612.00. Both of these allowances are carried into their summary sheet 1 of Exhibit "B" as

Depreciation and Amortization $4,826,566. (R., 179.)

The Supreme Court of Ohio reversed the commission's allowance for depletion of gas well construction, gas well equipment and leaseholds, holding that under the Ohio law no such allowance for depletion or amortization could be made. Yet in the course of its opinion the court below said:

> "That the product natural gas will eventually die is self-evident." (R., 67.)

In its opinion the court below asks:

> "How can an allowance for new production and amortization be reconciled?" (R., 72.)

The obvious answer is that there is no connection or relation between the two. The court below did not understand the function of amortization or a depletion allowance.

Until the decision of the court below in this case, it had never been questioned but that a natural gas company was entitled to depletion and amortization.

In his dissenting opinion in this case in the court below, Judge Jones said:

> "Although the commission made a partial allowance therefor, the majority decision permits no allowance for depletion or amortization of utilities in cases such as these, where the annual drain upon their gas field resources by way of gas depletion is so heavy, eventually amounting to total exhaustion. Such a decision, in my judgment, where a low rate is fixed, tends to pure confiscation of property."

As was said by the late Judge Hickenlooper, of the Sixth Circuit when sitting in the case of **United Fuel Gas Co. v. Railroad Commission**, 13 Fed. (2d), 510 (affirmed 278 U. S., 300):

> "the right is universally recognized."

At page 518, Judge Hickenlooper said:

> "Because of the exhaustible character of his product, the natural gas operator is entitled to receive through the rates charged, not only his actual expenditures of operation and depreciation charges, in the sense of such sum as will keep his plant at 100 per cent. operating efficiency, but he is also entitled to such rates as will refund to him his entire capital investment within the life of the business. When the field is finally exhausted, as it must be, the reserve for depletion, or amortization reserve, should be sufficient to repay to the investor 100 per cent. of the original investment. Not only is the natural gas itself subject to exhaustion, but large quantities of casing in the wells, pipe line in the field and elsewhere, and other plant investment, are practically lost upon the exhaustion of the field. The cost of salvaging such material would, in many in-

stances, be more than its value. The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business, is universally recognized. This is in addition to what is ordinarily denominated a charge for depreciation or deterioration by use."

In the case of **United Fuel Gas Company v. Public Service Commission of West Virginia**, 14 Fed. (2d), 209, (affirmed 278 U. S., 322), Circuit Judge Rose said in his opinion at page 211, after first discussing depreciation:

"The plaintiff, moreover, is faced with a problem with which most public utilities are not concerned. It does not make the gas it sells. That has existed for milleniums, and plaintiff now owns much of it, or at all events, has rights to or in it. When it is used, it is gone forever. A portion of plaintiff's annual receipts, therefore, represents the proceeds of the sale of its property. Moreover, when the plaintiff's gas supply shall become so far exhausted that it can no longer be profitably transported and sold, a large part of the value of its physical plant will vanish, for, in the location in which it now is, and for the uses to which it is now put, much of it will be worthless, no matter in how good a state of physical preservation it may then be. It is possible that some of it may be put to profitable use where it is. Other portions may have an appreciable salvage value, but a good deal of it will inevitably prove a total loss. In short, in addition to setting aside something every year to make good ordinary depreciation, the plaintiff must make arrangements adequate for the amortization of a considerable part of its investment."

In the majority opinion of the commission in the case at bar, under the title "Amortization", it is said (R., 157):

> "In addition to the physical depreciation of the property we have also the difficult question of an amount proper to allow for depletion of the gas-bearing lands. When a well is drilled which produces gas it requires expensive equipment, including casing and other apparatus incident to its effective operation. Each well must be attached to a gathering line, often of considerable length, through which the gas passes to the transmission line.
>
> The average life of gas-bearing lands in Ohio is seven and one-half years, and as gas ceases to flow from any well in paying quantities, the land, the well, its equipment become almost valueless. The hole in the ground, of course, is a total loss as is the acreage it was designed to drain. The casing can be pulled for use at other points but the expense incident thereto makes it of little value. It may well be that the compressing stations and transmission lines will become useless as a field is exhausted, although we are of the opinion that transmission lines will be useful for many years beyond the period in which any particular gas producing land becomes valueless through depreciation.
>
> While there is no statutory provision covering the item of depletion, yet it is apparent that it should be treated substantially in the same manner as depreciation defined by the statute, and we may designate it rather inaccurately 'amortization.'"

. . . . . .

(R., 161)

> "As to amortization we have considered the evidence disclosing that the average life of an Ohio well is seven and one-half years. The depreciation

estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

Considering the present condition of these wells, the remaining life expectancy is an average of three years and two months. We have considered that Accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy we find that the annual amortization should be $4,158,954.00. The two items of depreciation and amortization amount annually to $4,826,566.00.

These allowances should be devoted to the purposes of depreciation and amortization alone and if necessary to be invested they should be invested in compliance with the statute and must not be devoted to any other purpose or used for paying dividends. If they are so conserved and used they will afford a fund from which the company may from time to time draw funds sufficient to keep the plant in effective operation. If the funds should be appropriated to other purposes, the time might well arrive when the company may not have available, and may not be able to obtain, the necessary capital to restore depleted property."

It has always been the practice of the income tax authorities to permit a deduction for both depletion and depreciation.

Section 23 (1) of the present and previous Revenue Acts provides and provided as follows:

"(1) **Depletion**—In the case of mines, oil and gas wells, other natural deposits, and timber, a reason-

able allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the commissioner, with the approval of the secretary. * * *"

In the case of **Central Kentucky Natural Gas Co. v. Railroad Commission**, 60 Fed. (2d), 137, the three-judge court said:

"The plan adopted by us provides for the return to the plaintiff of its entire capital by amortization in a period of twenty years. It permits the deduction of the necessary expenses incurred in ordinary maintenance. It furthermore sets up an annual reserve to cover extraordinary maintenance and repairs. It permits the deduction of all taxes, including the federal income tax."

This holding of the District Court was attacked in this court in **Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, No. 11 on the October Term 1933 Docket.** 290 U. S., ... In passing upon that case this court, by Mr. Justice Stone, said in the opinion dated December 4, 1933:

"Respondents assail the court's findings that the 45¢ rate was confiscatory and that the 50¢ rate was reasonable, and its findings of value and of the amount to be allowed as a deduction from gross revenue for amortization of the appellant's plants. So far as these objections and others are addressed to the weight of the evidence, we are satisfied that the evidence supports the findings as restricted in the manner already indicated. In view of the limited

effect which must be given to any decree to be entered, we have no occasion to consider these objections in any other aspect."

The necessity for allowing amortization separate from a depreciation or replacement reserve, when the rate under consideration is a gas rate as distinguished from rates of other utilities, such as telephone companies, was recognized and discussed in a concurring opinion in the case of **City of Cincinnati v. Public Utilities Commission,** 105 Ohio St., 181.

At page 200 it was said:

"Different utilities must necessarily have their depreciation accounts on different bases. For instance, a natural gas company, depending on nature for its product and knowing that that product will sooner or later become exhausted, must amortize its equipment by the time its product is expected to become exhausted. A telephone company, on the other hand, is not dependent upon nature but manufactures its product and presumably will have a perpetual and progressive existence."

Again, at page 208 it was said:

"Naturally there is a difference between utilities. A natural gas company must amortize its capital, because the product will eventually fail. A telephone company need not do so because it is unlikely that the telephone service will be discontinued or replaced by any other utility which will dispense with poles, wires, cables, conduits, switchboards and operators."

We do most certainly claim, and common experience shows, that gas wells and gas fields do exhaust and that

new fields must be explored, new wells put down, new rights of way obtained, new gathering lines laid, new compressor stations located, and that ultimately all the gas will be exhausted and the property will become mere scrap.

Natural gas is not regenerative. We have shown in the evidence that up to a very short time prior to the inception of this rate case the city of Columbus obtained all of its gas supply from what is known as the "Cambridge field" east of Columbus, without the aid even of compressor stations. Yet with almost no warning that field became practically exhausted, and Columbus gets practically none of its gas supply from that field. (R., 1783.)

At page 1516 of the record, Commissioner Bricker asked for the average life of these wells which had passed out of use. Mr. Huffman, one of the attorneys for the city, responded, "About seven years"; while Mr. Seyffert, company witness, said: "Somewhere around seven and one-half to eight years. There is something in the record about the average age of wells and the average life."

At page 1488 of the record, the city developed through Mr. Seyffert that the average life of the abandoned wells of The Ohio Fuel Gas Company was seven and one-half years.

In **City of Wheeling v. Natural Gas Company of West Virginia**, P. U. R. 1933 D, 1, the commission found that

the average life of abandoned wells was "six or seven years". (p. 17.)

In the case of **East Ohio Gas Co. v. The City of Cleveland**, now pending before the Public Utilities Commission of Ohio as Proceeding No. 7130, it was stipulated between the city of Cleveland and The East Ohio Gas Company that the age of abandoned wells in Ohio was 4.46 years; while the age of abandoned wells of the Hope Natural Gas Company in West Virginia was 9.06 years. The stipulations are a matter of public record and are to be found as to the Ohio property in Exhibit 3, page 25, and as to the West Virginia property in Exhibit 4, page 19, of said Proceeding No. 7130.

The theory of amortization applicable to the Appalachian gas field (which includes Ohio and West Virginia) is well set forth beginning at page 16 of the opinion of the West Virginia Public Service Commission in the case of **City of Wheeling v. Natural Gas Company of West Virginia, supra**, where it is said:

> "The fiscal theory upon which the company has acquired, and continues to hold leaseholds in reserve is that upon the exhaustion of its proven gas acreage explorations will be made on the reserve territory, and that abandoned areas will be supplanted by producing wells on the now undeveloped and unproven acreage. Such is the assumption that has led men experienced in the production and sale of natural gas to invest more than eight million dollars in the business under investigation, and such has been the experience of this and other gas producing concerns that operate in the Appalachian field. Upon that theory, assumption and experience,

therefore, it appears reasonable to expect an additional life of fifteen years of available gas supply, and of service from the property now in use as the same will be replaced from year to year from investments out of the retirement reserve, making the estimate of the future life of the investment thirty years in all. This estimate is not to be confused with the average life of individual gas wells, which is six or seven years according to the record and contemplates four or five cycles of drilling for gas. It is made, also, on the assumption that the company will continue to purchase a part of its gas supply, but that upon the abandonment of its own acreage, other acreage will also have been exhausted."

In the present case the company's request for a 4 per cent. amortization allowance on the present value of the production and transmission property (including the portion of general property applicable thereto) was based upon a **further** life of twenty-five years. The commission found that the operated acreage had a life of but three years and two months. (R., 161.)

However, in fixing the amortization period the company assumed that the reserve acreage now held, plus such additional gas lands in Ohio as might be acquired, would extend the life of the company twenty-five years from the date certain.

Concerning this estimate the witness Seyffert testified on cross examination, as follows (R., 1480):

"Q. * * * You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir."

(R., 1489)

"Commissioner Bricker: What else would you set up amortization on except leaseholds?

The Witness: Set up amortization on the whole property, because when the gas is gone, the rest of the property will be of no value to the stockholders."

There is no evidence in the case contrary to the foregoing.

The city's witness, young Mr. Blundon, testified at R., 1768:

"I don't agree to the principle of amortization."

In questioning Mr. Blundon on the subject of "amortization", Commissioner Bricker, who afterwards wrote the minority opinion, asked at R., 1769:

"Commissioner Bricker: Well, you know as well as anybody else on the street would know that regardless of what the records in West Virginia would show, that there is a depletion going on, do you not?

The Witness: There is a using up of the gas, yes, sir, but new fields are discovered and brought in so —let me give an example of that, that in West Virginia the gas reserves of the company in 1928 were greater than they were in 1923.

Commissioner Bricker: But there is actually a depletion. If it is taken up in some other system of accounting or in some other added assets to the company doesn't wipe out the fact that there is an actual depletion or a using up of the property of the company."

That the minority commissioner understood the subject of "depletion" is shown by his question put to the

witness some ten months prior to his computation of a rate—when it became apparent that if depletion were recognized the 48 cent rate would necessarily have to fall.

That the court below did not understand either the theory or subject of "amortization" will be apparent from a reading of the per curiam opinion and the eighth branch of the syllabus, which is as follows (R., 52):

> "8. The laws of Ohio make no provision for amortization, and the Public Utilities Commission of Ohio is without authority to take it into consideration in the ascertainment of **values** in fixing a rate." (Boldface ours.)

When the opinion was first handed down the last word was "rate-base". After overruling our application for rehearing the last half of the hyphenated word (base) was stricken out. However, that does not change the fact that the court below still thinks, as shown by its opinion in this case, that amortization has something to do with valuation. Had the court below recognized that depletion and/or amortization were expense allowances, it would have omitted a discussion of valuation statutes in respect thereof.

While it is the general rule of this court to accept the interpretation of state statutes by the court of last resort of the state, yet the court's reading out of Section 614-46 of the General Code of Ohio—and omitting to even quote or discuss the same—the language which not only authorizes an allowance for depletion and amortization

but is the only authority in Ohio for the allowance of any operating expenses whatsoever, is so patent and so illustrative of the misunderstanding of the court below of appellant's case that we believe the statute should be considered by this court.

In the following quotation from Section 614-46 of the General Code of Ohio we shall emphasize in boldface the language which the Supreme Court of Ohio refused to consider:

> "Sec. 614-46. If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any poltical subdivision of the state or county as a consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, **and such other matters as may be proper, according to the facts in each case**, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same. * * *"

In respect of the amortization allowance for the West Virginia property made by the majority of the commission, the court below said (R., 58):

> "With reference to the item of depreciation and amortization, the West Virginia commission allowed 1.12 per cent. for depreciation and 4.15 per cent. for amortization. These figures were carried over into their findings by the majority commission. We hold elsewhere in this opinion that amortization cannot be allowed under Ohio law. The Ohio statute provides for an allowance for depreciation but not for amortization. Section 499-9, General Code."

Now, Section 499-9 of the General Code has nothing whatever to do with the allowance of expenses. That section provides exclusively for the method of valuation. (See Appendix.)

The confusion of the court below—for confusion it is—may be due to the double aspect of depreciation. Depreciation is used in the valuation statutes for the purpose of requiring a deduction—not of the accrued depreciation reserve—but of the loss of value by reason of actually existing deterioration in the physical equipment which has been valued on a cost of reproduction basis. This has nothing to do with the **expense** item of depreciation. It is for the sole purpose of ascertaining present value.

Amortization has no such double aspect. It is a function of expense only, and is clearly required to be allowed to a natural gas production and transmission company by the language of Section 614-46 (quoted above), the

significant provision of which the court below entirely ignored, and thus by its interpretation of said statute rendered the same repugnant to the Fourteenth Amendment of the Federal Constitution.

Under the heading "Depreciation and Amortization" the court below said (R., 65):

> "Depreciation is the reduction of worth. Amortization is the extinguishment of an existing debt or claim by means of a fund created for that purpose.
>
> Sections 499-8, 499-9 and 614-46, General Code, deal particularly with the legislative processes that the Public Utilities Commission must use in evaluating the properties of public utilities.
>
> Section 499-8, General Code, provides that when the commission deems it necessary, it may 'investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public.'
>
> Section 499-9, General Code, provides how the valuation shall be made. This section provides that the report of the commission on value shall show certain facts as specified in paragraphs A to H, inclusive. Paragraph E deals with 'depreciation', as follows:"

The court then further discusses the methods of valuation, and comes to the following conclusion (R., 66):

> "There is no provision for amortization under the laws of Ohio. Where the life of a utility's product is uncertain, can it be intelligently and fairly amortized? We think not.
>
> The contention that there should be an allowance by way of amortization sufficient to return the entire investment of the company to the stockholders dur-

ing the period of the life of the business is untenable, as the business has no fixed life.

As bearing on the question of the certainty of the life of the business, the gas company places much stress on the testimony of practical gas men, to the effect that they could not predict a longer life than twenty-five years for the company. Practical experience teaches us that this is a mere prophecy. The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guess-work. An allowance for amortization such as contended for by the company would place an unwarranted burden upon the present consumers of gas. The stockholders of the gas company at no time had any right to anticipate that the law would, in addition to dividends, at some time hand them back their original investment. The nature of the natural gas business **has been precarious at all times;** but so long as it has continued to function, its returns have been reasonably liberal.

Capital does not feel its way to an enterprise in this day and age. Investors investigate the vices and virtues of a proposition before investing. Public utilities, and natural gas companies in particular, advance the theory that they are public servants, furnishing the public with a perishable commodity; **that their product is short-lived; that when their product dies it is left with an expensive property that cannot be utilized for other purposes, and that it is only fair, during the life of the company, that its investment should be returned to it by way of amortization.**

That the product natural gas will eventually die is self-evident. When it will die is an assumption. An assumption is no stronger than the facts that support it, and it is just and fair to assume that much of the equipment now used in the transportation and distribution of natural gas will be utilized for the transportation and distribution of artificial gas in the future.

We must accredit to the men who organize and manage public utility corporations, in which millions are invested, a higher degree of intelligence and a keener foresight than that of the ordinary individual. Hence to say, or even to think, that upon the failure of natural gas the entire property of a natural gas company would be scrapped would be a puny tribute to those responsible for its conduct."

(Of course, the court below could not possibly have had in mind such public utilities as the urban and interurban street cars, the artificial gas business in Ohio, and others.)

"The evaluation of the property of a public utility is governed solely by the statute of Ohio. The Public Utilities Commission of Ohio is the agency employed by the state in making valuations and fixing thereon rates of return. In the exercise of this power does it have a discretion?

Depreciation is an incident to valuation. In considering the item of depreciation the court takes judicial cognizance of the fact that the trend of material and labor cost is downward. * * *

* * * If amortization is to be allowed this company, it should be based on the probable life of the business and not on the probable life of its producing wells. The commission did allow $4,158,954 for amortization annually, based upon a life expec-

tancy of three years and two months for producing wells. It is conceded that the life of the company will be at least twenty-five years. Hence, if amortization was allowable under the laws of Ohio, it should be spread over the twenty-five years. Unless amortization can be converted into some sort of depreciation there is no authority in law for such a charge in this state.

It may be insisted that unless a reasonable amount is allowed annually for amortization a fair rate basis cannot be attained. That may be true, but the Legislature has prescribed a formula. If this formula is unfair to the utility, unless and until it reaches the point of confiscation the remedy is with the Legislature and not with the courts." (Boldface ours.)

There is so much inconsistency and contradiction in the foregoing quotation from the opinion of the court below as to definitely justify our conclusion that on the subject of "amortization" the court below was confused.

However, there is another phase of the situation to which it is our duty to call the attention of this court, to wit: that, patently, many of the foregoing observations of the court below are not based upon anything to be found in the record.

The writer of the foregoing part of the per curiam opinion is setting himself up as an expert and concluding contrary to the record in this case. If there is any judicial notice to be taken on the subject, it must necessarily be of the fact that natural gas is not regenerative, and that natural gas fields do become exhausted. There is no need, however, for resort to judicial notice on this

subject. Much space is given in the record to show some of the fields that have become exhausted and some of the many companies that had to go out of business on account of the fact that their gas fields had become exhausted.

The testimony shows that the reason for The Columbus Gas & Fuel Company entering into a supply contract was that its own supply of natural gas had become exhausted (R., 665; 1489). The record shows that until shortly before the hearing in this case the city of Columbus had gotten all of its supply from the Cambridge fields, which have since become practically exhausted (R., 1783). The record shows that the city of Lancaster, Ohio, formerly had its own supply of gas, which on account of exhaustion had to be supplemented by the gas of The Ohio Fuel Gas Company.

Company Exhibit 57, pages 8 and 9, gives a long list of companies whose distribution properties, according to the testimony, were taken over by The Ohio Fuel Gas Company because the gas supply of the companies taken over had become exhausted. (R., 1052.)

Indeed, the writer of the per curiam emphasizes the inconsistency of the position taken by saying in so many words "That the product natural gas will eventually die is self-evident."

How the stockholder is ever going to get his investment back, or even keep it intact by dividends, is not explained by the writer of the per curiam. Certainly it cannot come from dividends from a company limited

to a 6½ per cent. return on a low valuation, with a niggardly allowance for depreciation and no allowance for the out-of-pocket expenses of such substantial items as lease rentals, and with no allowance for "surplus, contingencies, and such other matters as may be proper according to the facts in each case".

The court says that amortization is not allowable under the laws of Ohio, and proceeds to quote the **valuation laws** in justification of that holding.

Further on in the opinion, after quoting from the commission's opinion on "depreciation and amortization", the court below said (R., 72):

> "This would be good law, if it were the law. But we just can not read amortization into the law of Ohio. The Legislatre had its reason for not making a provision for amortization in the legislative formula provided for **evaluating** the properties of public utilities. How can an allowance for new production and amortization be reconciled? How can you spread amortization over the uncertain life of a natural gas company? The commission undertakes to spread it over the life of producing wells. If amortization were permissible under the statute, this rule could not be indulged.
>
> The commission holds that life expectancy of the gas company's producing wells is three years and two months, and on this basis there should be an annual amortization of $4,158,954. With this finding of the commission this court cannot agree." (Boldface ours.)

That the commission was calling depletion "amortization" is clearly shown by the following quotation from the commission's opinion (R., 158):

> "While there is no statutory provision covering the item of depletion, yet it is apparent that it should be treated substantially in the same manner as depreciation defined by the statute, and we may designate it rather inaccurately 'amortization.'"

Waiving for the moment the question of amortization, the court below has denied the company the right to recoup for the depletion of a wasting asset. The court below assumes that the gas company must contribute the gas if the commission has in its rate provided for a return upon the physical property used and useful in producing the gas. That this preposterous doctrine is not so we are confident. Had the court below read the record, or had the court below attempted to tabulate and compute the result of its own decision, it is difficult to understand how it could have failed to see that its construction of the statutes of Ohio rendered such statutes repugnant to the Constitution of the United States by confiscating the property of appellant without due process of law.

If the court below had read the record it would have understood that the allowance made by the commission for depletion—as it was loosely and inaccurately called "amortization"—had nothing whatever to do with valuation. That this is an expense allowance is clear. That an allowance for amortization is an expense allowance is

equally clear. That a producer of natural gas is entitled to both of these allowances is, as said by the late Judge Hickenlooper, "universally recognized".

The Bureau of Mines Bulletin for 1929 (Co. Ex. 206, p. 336) contains the following statement:

> "During 1929, 2870 wells were completed in the United States exclusive of California (for which state the record is lacking) compared with 2727 in 1928, an increase of 5%.
>
> Ohio, with 801, was the leading state in number of gas well completions in 1929. This figure represents a very material gain over 1928, although the total output of gas in Ohio was only slightly higher than in 1928."

Here is a significant statement, which shows that while the rate of increased well drilling in Ohio was approximately three times the average rate of increase throughout the country, yet gas production was but slightly more than the preceding year. In other words, the law of diminishing returns was probably setting in in Ohio.

In this connection it is to be pointed out that in the majority opinion, under which the 55 cent rate was reached, the depreciation allowance was 1½ per cent. straight line, which means the assumption of a 66 2/3 years life, provided no part of it was used for replacement and/or extraordinary repairs, which is the purpose of a depreciation reserve. It would be difficult indeed to find any business in this country, utility or otherwise, whose experience shows a plant account with an average life of 66 2/3 years. It just can't be done. There are com-

paratively few businesses or enterprises which survive more than a generation. The depreciation reserve does not provide for either the depletion of wasting assets or the amortization of the production and transmission facilities upon the inevitable exhaustion of the gas fields.

In discussing "A Theory of Foresight", Dean Donham, in his splended book entitled "Business Adrift" (McGraw-Hill), suggests that business planning be based upon a business generation, i. e., from twenty to twenty-five years. There is an introduction to Dean Donham's book by Professor Alfred Whitehead, in which he says at p. xviii:

> "In the fifty years between 1780 and 1830, a number of inventions came with a rush into effective operation. The age of steam power and of machinery was introduced. But for two generations, from 1830 to 1890, there was a singular uniformity in the principles of technology which were regulating the structure of society and the usages of business.
>
> The conclusion to be drawn from this survey is a momentous one. Our sociological theories, our political philosophy, our practical maxims of business, our political economy, and our doctrines of education, are derived from an unbroken tradition of great thinkers and of practical examples, from the age of Plato in the fifth century before Christ to the end of the last century. The whole of this tradition is warped by the vicious assumption that each generation will live substantially amid the conditions governing the lives of its fathers and will transmit those conditions to mould with equal force the lives of its children.
>
> We are living in the first period of human history for which this assumption is false."

According to the finding of the commission in this case, the average age of gas-bearing lands in Ohio is seven and one-half years. (R., 157.)

Based upon the age of already abandoned wells as found in this case, it would take about three and one-half sets of wells to last a business generation of twenty-five years. But to be conservative let us assume that two sets of wells would last a business generation. The commission allowed in this case one well to eighty acres. (R., 153.) Assuming 3700 wells for each cycle, approximately 600,000 new acres of operated gas lands would be needed. This would assume a continuation of the same average recovery of gas, which can hardly be expected. According to the testimony in this case, approximately one out of ten acres of leased territory becomes No. 1 operated acreage. Therefore, it would require approximately 6,000,000 acres of reserve territory out of which to sift this supply. This is more than twice the entire acreage holdings of The Ohio Fuel Gas Company.

The Ohio Fuel Gas Company has only 291,396 acres of No. 1, which is the only acreage upon which the commission or court recognized even book value. For the balance of the company's acreage neither the commission nor the court allowed even the annual rentals which have to be paid to carry same. The evidence shows that in addition to the No. 1 acreage The Ohio Fuel Gas Company carries 164,739 acres of No. 2, 312,631 acres of No. 3 and 2,065,421 acres of No. 4—or a total of all classes of 2,834,187 acres (Co. Ex. 44, p. 19) (R., 2910).

Depletion—Amortization.

The minority commissioner allowed nothing for depletion but did make a combined allowance of 2½ per cent. under the heading of "Depreciation and Amortization" amounting to $1,765,607, notwithstanding that the city had conceded a depreciation rate of 3.6 per cent., amounting to $2,848,301.74. (R., 160, and City Ex. 74, p. 12.)

As will be pointed out in a discussion of the West Virginia property, the minority commissioner deducted all of the amortization allowance made by the West Virginia commission (at the rate of 4.15 per cent. of the rate base).

While the minority commissioner calls his allowance for The Ohio Fuel Gas Company expenses "Depreciation and Amortization", yet we think it is clear not only from his action in totally excluding the West Virginia amortization and from his reducing the conceded allowance of 3.6 per cent. by the city for depreciation to 2½ per cent. for both depreciation and amortization, but also from his statement in his opinion, that he did not make any allowance whatsoever for amortization.

The minority commissioner said (R., 205):

> "I have, in computing an allowance for depreciation and amortization, used 2½% of the value of the property, excluding land, working capital, materials and supplies, which reduces the amount claimed by the company in the sum of $5,103,855.00. A complete study has been made of the depreciation charges of the company which show for the year 1929 an unexpended depreciation reserve in the sum

equal to 22.20% of the book value of the company's property.

It is my opinion, therefore, that an allowance of 2½% on the value of the property of The Ohio Fuel Gas Company is a reasonable allowance for depreciation in view of the fact that there has been allowed completely the company's figures for maintenance, including non-productive well drilling expense.

These amounts are sufficient, when taken together, to maintain the property in a high standard of efficiency and to provide a reserve to take care of the property as it wears out and to ultimately provide for the complete replacement of the property.

The amount of depreciation, herein allowed, applicable to the portion of its property considered in this case is substantially the same amount in dollars, as shown by the books of the company for its entire properties including its distribution system."

We think it is clear that the minority commissioner made no allowance of any kind for amortization.

Before pointing out the difference which would have been made in the gate price and retail rate by the allowance of the city's admitted rate of depreciation, we wish to call the court's attention to the differences in gate price resulting from the figures as allowed by the majority and minority, respectively, of the commission as shown by Sheet 1 of their respective "Exhibits "B" attached to their findings.

The minority commissioner's allowance for "Depreciation and Amortization" is $3,060,959 less than the allowance made under the same head by the majority.

This difference when divided by 53,579,575 M c. f.—the Ohio Fuel sales as shown on the same sheet — equals 5.7129 cents. If we add to this the difference on account of the treatment of the West Virginia expenses and return—1.2284 cents—we get a difference of 6.9413 cents per M c. f.

The majority fixed a gate price of	39.02 cents,
while the court (minority commissioner) fixed the gate price at	31.70 cents
Difference	7.32 cents
Less	6.94 cents
	.38 cent.

Had the minority commissioner allowed the annual depreciation conceded by the city of Columbus—$2,848,301.74—his gate price would have been 33.721 cents instead of 31.70 cents as shown by the following correction:

The item "Depreciation and Amortization" on Sheet 1 of the minority commissioner's Exhibit "B" (R., 217) would be changed to $2,848,302 as admitted by the city. This would change the item "Total Expenses and Return" on the same sheet to $18,067,869, which amount divided by the Ohio Fuel sales, shown on the same sheet to be 53,579,575 M c. f., would produce a gate price of 33.721 cents. Carrying this gate price to Summary Sheet 1 of Exhibit "C" of the minority commissioner's findings (R., 220) would increase the item "Purchased Gas—from Ohio Fuel Gas Company" at 33.721 cents per M c. f.

(5,955,221) to $2,008,160. This would have increased the item "Total Expenses and Return" on said sheet to $2,839,914. Dividing this last amount by the retail sales shown on the same sheet, 5,671,639 M c. f., would give a retail rate of 50.07 cents per M c. f. instead of 47.95 cents.

This, however, does not tell the whole story. As shown in City Exhibit 69, page 1 (R., 3042), the city conceded an annual depreciation allowance of $88,695.03 on the Columbus property. Instead of using this conceded amount, the majority commission, as shown on their Sheet 1 of Exhibit "C", (R., 182) reduced this to $51,154.00, while the minority commissioner reduced it to $68,196.00 (R., 220). Adding this difference to the minority commissioner's depreciation allowance and considering the depreciation allowance on The Ohio Fuel Gas Company's property as admitted by the city, the item "Total Expenses and Return" on Sheet 1 of the minority commissioner's Exhibit "C" becomes $2,860,413. Dividing this by the Columbus sales — 5,671,639 M c. f.—gives a retail rate on the minority commissioner's calculation of 50.43 cents per M c. f. as against the 47.95 cents.

Applying the conceded annual depreciation of the Columbus property to the majority's Sheet 1 of Exhibit "C" brings their retail rate to 55.71 cents instead of 55.049 cents.

It is most earnestly claimed by appellant that in addition to the allowance for depletion of Accounts 205, 211 and 212 made by the majority of the commission in ar-

riving at its 39.02 cent gate price and its 55 cent retail rate, there should be a reasonable annual allowance on the balance of the production and transmission systems. The evidence establishes (R., 1480 et seq.) that 4 per cent. of present value is a reasonable amortization allowance for the production and transmission systems.

Making the following deductions from the present value of the used and useful physical property of The Ohio Fuel Gas Company, as shown on Sheet 2 of Exhibit "B" attached to the majority's findings (R., 180), in addition to deducting the $17,299,026 of present valuation for which depletion was allowed on Accounts 205—leaseholds, 211—gas well construction and 212—gas well equipment, to wit:

Production land	$20,514.00
Transmission land	67,818.00
General land	108,906.00
Other general land	2,757.00
Working capital	2,690,132.00
making a total of this subdivision of	$2,890,127.00
which added to the	$17,299,026.00
gives a total deduction of	$20,189,153.00,

which deducted from the present value found by the majority leaves the amount of additional amortizable property as $54,349,126.00. 4 per cent. of this last amount produces the sum of $2,173,965.00. Adding this to the "Total Expenses and Return" as shown on Sheet 1 of Exhibit "B" attached to the majority's findings

(R., 179) makes the item "Total Expenses and Return" $23,081,807.00, which divided by the Ohio Fuel sales—53,579,575 M c. f.—produces a gate price of 43.079 cents. Applying this gate price to Sheet 1 of the majority's Exhibit "C" increases the item "Purchased Gas—from Ohio Fuel Gas Company" at 43.079 cents (5,955,221) to $2,565,450, and increases the item "Total Expenses and Return" to $3,363,814. Dividing this by the M c. f. sold —5,671,639—produces a retail rate of 59.31 cents.

We have already shown above that the difference between the minority and majority rate is approximately accounted for by the difference in River price and the omission of a depletion allowance from the minority's calculation.

A (3) DELAY RENTALS.

The court below refused to allow any part of the sum of $1,684,913 of annual expense in Account No. 360 for lease rentals actually paid. This arbitrary disallowance of a necessary expense of operating a natural gas producing utility resulted in a reduction of 3.145¢ per M c. f. at the Columbus gateway.

These rentals accrue under the terms of leases which grant to the company the right to prospect and drill for gas on particular premises. (Co. Ex. 149.)

The advisability of acquiring a particular lease is dictated by various considerations, such as the location or proposed location of a pipe line or compressor station,

markets to be supplied, drilling operations not only of the company but of its competitors, the protection of the gas under the operated acreage from withdrawal by competitors, eliminating the expense of offset wells and assuring lower cost of production and operation.

The exigencies of the industry require planning and foresight. Probable gas lands must be prospected and drilled before the operated acreage becomes exhausted. This is the only way in which the company's investment can be protected and its obligation to its consumers discharged.

When a lease is drilled and gas is found, the rental ceases and thereafter the company pays a well royalty to the lessor. Hence these lease rentals are known in the industry as "delay rentals". If the rentals are not paid, then the company loses the right to drill for gas and the fee owner is at liberty to enter into a new lease with others.

The acreage covered by these leaseholds is known in the industry as

(a) Operated acreage—being those leaseholds upon which gas wells have been drilled and brought in. For the use of these leaseholds a well royalty is paid.

(b) Unoperated or reserve acreage, which has not yet been drilled. On these leases the delay rentals are paid.

Operated acreage is developed from the reserve acreage.

For convenience in the matter of appraisal only, the

gas leaseholds were classified as Classes Nos. 1, 2, 3 and 4, Class No. 1 being the only class presently operated.

As will be pointed out more in detail later, The Ohio Fuel Gas Company could neither be established nor operated without such reserves. (R., 1380-1381; 1121, 1123; 1194; 1195; 1258.)

The primary purpose of such reserve leaseholds is, of course, to provide a continuing supply of gas. Without such reserves, pipe lines and compressor stations could not be built because the cost of such construction could be recovered only over a period of years. The sale of natural gas would thus necessarily be confined to the immediate vicinity of the well. In the light of experience of failures of supply municipalities would not grant a franchise to any company which did not have sufficient reserves to justify a supply of gas for at least a business generation.

The experience and judgment of the industry has dictated that instead of taking the chance of being able to buy leases in the open market as they are needed for prospecting and drilling, the business can be successfully financed and conducted only through the assurance that these reserves are in hand.

Not only are the reserve leaseholds an assurance of continued supply, but they are a protection as well to the operated acreage, as will be pointed out more fully later.

Certainly without the reserves in hand no natural gas company would be justified in entering into contracts with municipalities and others for a supply of gas over

a term of years greater than the expected life of the presently operated acreage.

In the present case the commission found and the court below noted that the then presently operated acreage would supply gas for a period of but three years and two months.

New wells must be drilled continuously in the reserve acreage to maintain a continuity of gas supply.

Until the decision in this case, the propriety of allowing a natural gas company the expense actually incurred in carrying a reasonable amount of reserve gas acreage had never been questioned in Ohio.

Indeed, in the uniform classification of accounts for natural gas utilities, adopted by Ohio, West Virginia, Pennsylvania and practically all of the other states in which natural gas is found, specific provision is made for charging these lease rentals to operating expense. (See Co. Ex. 86, page 57, Account 246) and testimony of Mr. Hightower at R., 2170, that there was no substantial difference between the West Virginia and Ohio classifications.)

The commission allowed the West Virginia delay rentals expense, but the court below held that even this was error. The West Virginia courts and commission do allow delay rentals expense.

It was nowhere suggested that the company was carrying too much reserve acreage. Neither the city, the commission nor the court questioned the amount.

Delay Rentals.

In the case of **United Fuel Gas Co. v. Railroad Commission**, 13 Fed. (2d), 510-515, Judge Hickenlooper said:

> "We think it must be conceded that the company has a right to hold, as used and useful in its business, reserve or undeveloped gas acreage, in which to prospect for gas. Much of this may prove unprofitable, but it is necessary for the continuance of the life of the business."

In its opinion the commission in the instant case said (R., 148):

> "In addition to the lands now used as a present source of supply, it also developed the fact that the company holds in reserve under lease hundreds of thousands of acres of lands not yet developed but which are a potential reservoir which must be controlled in order that a continuous supply of gas may be assured such as will justify the investment of large sums of money in transportation and distribution systems.
>
> The commission has had opportunity to examine expensive equipment including powerful compressor stations where batteries of from eight to sixteen engines, each of 1500 horse power force the gas that has been collected from widely separated wells, under high pressure, to the place of consumption through hundreds of miles of transmission pipe of large diameter.
>
> The commission has gained some conception through many expert witnesses, having undoubted skill and experience, of results accomplished by the intelligent expenditure of capital in an enterprise whose hope of reward rests upon its ability to furnish to many small consumers a commodity, the enjoyment of which is eagerly sought. The commission has been impressed with the fact that this

great natural resource could not have benefited the consumer unless there had been an intelligent application of capital to its development and transportation.

* * * * * * * * * * * * *

(R., 155)

It is urged by the company that a wise business policy dictates that future requirements must be provided for to justify the expenditure of large sums of money in transportation and distribution facilities. It is insisted that the control of large reservoirs of gas for future use is the very foundation of the stability of the company and that without such reserve the company could not in justice to itself spend the sums necessary for transmission lines and for distribution within municipalities. It is insisted that it would be the height of folly to venture large sums which would be lost to the company if it were deprived of the back-log of gas reserves, and it is pointed out unless the company secure to itself these gas lands for future development, a rival company might come into the field and lease the lands placing the present company at the mercy of its rival, when it has exhausted the gas beneath what is now designated as productive acreage.

It is insisted that while the Supreme Court in the Logan Gas case above referred to decided that unproductive lands could not be considered in fixing the base valuation, yet the question was not squarely placed before it as to whether or not the expense of carrying this acreage was a proper maintenance charge to be paid out of the income of the company, to be charged against the present rate payer.

It must be admitted that there is much force in the contention of the company."

In his dissenting opinion in the court below, Judge Jones said (R., 74):

> "Because of the peculiar hazards of the business and of inevitable gas exhaustion resulting in so short a period as that found by the commission (being presently three years and two months), ordinary business sense would require a reasonable gas tract reserve, in addition to the tract that is being actually operated, in order to supply the public's future needs. That situation, which is now so evident, did not so clearly appear when we decided the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 527."

To properly understand the subject of delay rentals, one should envision the practice of the industry as set forth in the testimony of the witnesses.

At R., 1379, Mr. T. R. Weymouth, a man with a national reputation as a gas engineer and a practical operator, testified:

> "The foundation stone of all natural gas companies is, of course, its supply of natural gas. In order to establish a natural gas company one must first have sufficient gas reserves to seek a market. Once those reserves are in hand then the project becomes one of finding the most suitable market for them and connecting the reserves to the market."

The answers of Mr. Weymouth concerning gas reserves are enlightening. (R., 1378 et seq.)

Gas territory is first prospected, geological investigations are then made, and if these reports are favorable, leasing operations follow. There must be sufficient prob-

able gas territory to justify the venture. Leasing is but one part of the business plan, but unless there are sufficient leases in hand, it would be mere folly to build a transmission and/or distribution system.

The testimony shows that out of an average of 10 acres leased, one acre becomes producing gas territory. (R., 1380.)

In the East Ohio-Hope case now pending before the Ohio commission the testimony is to the effect that the ratio is 1 to 12.

After the territory is leased then it is developed as needed according to the company's markets and plan of operation. If no gas is found, the particular lease may or may not be abandoned at once, depending upon surrounding circumstances. If gas is found, then well royalty becomes payable and delay rentals cease.

After gas is found on a lease that lease must be protected either by drilling off-set wells or by leasing surrounding territory.

As a pool is defined by wells and dry holes, additional leases are taken and/or old leases surrendered for the development and protection of the pool.

Both as old territory is exhausted and as new territory is developed, old leases are surrendered and new leases taken.

All of the foregoing steps to be taken involve matters of judgment, which only the trained and experienced operator is qualified to exercise.

The acreage which the company now holds under lease

was accumulated over years of time—it was not all acquired at once. Many leases originally taken have been surrendered and others acquired from time to time. The exhaustion of old fields and the development of new fields requires the constant exercise of judgment and foresight in the matter of reserves. The location and/or spacing of wells so as to economically recover the gas from the sands, the direction from a proven well for the location of a new well, depend upon whether leases other than the one upon which the original well is drilled are available. Such reserve leases must be acquired when available. No business can be run successfully without the exercise of some foresight.

At page 9 of City Exhibit 74 it is claimed by the city, and was adopted by the commission, that the 3662 gas wells were 58.1138 per cent. depleted. (R., 1510.) (At another point we are questioning the use of the depletion method instead of the observation method to ascertain the present condition of the gas well construction and equipment. That, however, has nothing to do with the question of reserves.).

The record shows (R., 1319-1320) that in the two years' period from June 30, 1929, the basic date of the leasehold valuation, to May 31, 1931, the company had drilled 685 wells in twenty-eight counties of the state, and that all but 14.3 per cent. of those wells were drilled in acreage other than that classed as No. 1.

It is also shown by said record that of the grand total of 685 wells, only 98 were drilled in No. 1 acreage; while

287 were drilled in No. 2 acreage, of which 54 were dry and 233 productive; 130 drilled in No. 3 acreage, of which 41 were dry and 89 productive; in Class No. 4 acreage 170 wells were drilled, 80 of which were dry and 90 productive. In other words, the company drilled in that period almost twice as many wells on No. 4 leases as it did on No. 1 leases. The reason for this, as shown by the testimony, is that No. 1 leases had on them at the date certain approximately all the wells necessary to economically drain the territory. (R., 1052, et seq.)

At page 1048 of the record and in Company Exhibit 180 (R., 3002) it was shown that in twelve different counties of the state, ranging from Gallia at the Ohio river to Ashland in the north, it was necessary for the company to make annual payments in lieu of drilling because of complaints by the lessors and of the fact that it could be established that the gas under the undrilled acreage in question was being taken out through the so-called No. 1 operated acreage.

Company Exhibit 179 (R., 3001) shows that during the years 1927, 1928 and 1929, 46,333 acres were transferred from unoperated to operated acreage. Applying the average of one out of ten, this means that 463,333 acres were culled.

The record shows, through the testimony of Messrs. Seyffert (R., 1053) and Pepperberg (R., 1381), that if the company were to be confined to its No. 1 leaseholds there would be required immediately a large investment in off-set wells to protect the No. 1 acreage. That by

limiting the drilling in the immediate future to No. 1 acreage, the production per well would be reduced while the cost per cubic foot of gas would be increased. (R., 1054.)

To properly understand the question of gas supply, a study must be made of the manner and times at which the gas is taken out. In other words, the load factor.

Company Exhibit 182 (explained, R., 1384) illustrates in graphic form the necessity for the company to carry unoperated acreage. The area shown by the cross-hatch lines and designated "Production in Reserve by Company" does not represent the number of units of gas in the ground in the developed territory, but represents the amount which is available to the company by the full use of all of its wells, together with all of its compressor stations, in the manner in which they are used. It will be quite obvious that if the company were to draw upon this area at all times in the same degree that it does during the peak load, the reserve would be quickly diminished, necessitating further additions.

The company must provide the facilities for the maximum demand periods of the year. This means not only that for a four months' demand of the year the company must maintain full facilities for twelve months, but it means that for about the four to ten extremely low temperature and/or high wind days the company must maintain for three hundred and sixty-five days the facilities necessary to furnish adequate supply for these few days. (See Commission Opinion, R., 148.)

This means not only that the transmission lines must be large enough, the compressor stations have capacity and power enough, the gathering lines sufficient, but there must always be provided ahead of time sufficient stand-by wells to be drawn upon during the periods of maximum demand. (Commission Opinion, R., 148.)

Company Exhibit 182 shows that in December, 1928, out of a total of 3383 wells owned by the company 3349 of them were in use; while in October, 1929, out of a total of 3480 wells, 1306 of them were shut in; in January, 1930, out of a total of 3619 wells, 3567 were in use, while in the following April out of a total of 3649 wells, 604 were shut in; while in the following August out of 3688 wells, 2300 of them were shut in.

The undisputed evidence shows that in the natural gas industry it is necessary continually to be prospecting and developing gas fields ahead of the day when they are actually used. (R., 1319-1320; 1381, 3001.)

The evidence shows that the company buys all of the gas offered for sale in Ohio by independent producers, yet all of this purchased gas, including the purchases from West Virginia, averaged over a three year period only 22.3 per cent. of the required supply. When we come to consider the maximum demand we find that all of the independent producers could supply but 13.9 per cent. of the maximum demand.

Every witness who testified on the subject stated that all of the reserves were presently used and useful and absolutely necessary to the establishment and continuation of the business.

Mr. T. R. Weymouth, whose qualifications will be found at R., 364, testified as follows:

(R., 1380.) "Q. Would you, as an operator, attempt to establish a company such as The Ohio Fuel Gas Company with its present business limited only to No. 1? A. You couldn't do it; you couldn't make proper representations to the people whom you wished to buy gas from you, neither could you raise any money to build a project of that kind on that basis."

(R., 1381.) "Q. And I want to know whether you could successfully operate a gas company without reserves? A. No, you could not, not at all. I think the—I don't know of any successful natural gas company that does not have gas reserves and which does not depend upon those reserves?

* * * * * * * * * * * * * * *

Commissioner Geiger: I see. But then you would have to get No. 3 in order to protect No. 2 and No. 4 in order to protect your No. 3?

The Witness: Yes, you have to have Nos. 1, 2, 3 and 4 acreage not only as a matter of protection but also as a possible source of supply for the continuation of your business.

Q. It was testified in this case, at pages 3317-3318, that out of a total of 685 wells drilled by The Ohio Fuel Gas Company between June 30, 1929, and May 31, 1931, only 14.3% of them were in No. 1 territory while 41.9% were in No. 2 territory, 19% in No. 3 territory and 24.8% in No. 4 territory. Does that to your mind illustrate the necessity of a public ufility or a company such as The Ohio Fuel Gas Company having all of these reserves? A. It not only illustrates that but it shows the actual practice, the actual fact that these reserves are used and necessary for the perpetuation of the business. The very fact that you have drilled on No. 4 territory,

No. 3 territory and No. 2 territory, as well as No. 1, is the most convincing proof that I know of that this outside territory is necessary in the conduct of the business."

(R., 1383.) "Q. The evidence in this case shows that more than 40,000 acres of The Ohio Fuel Gas Company's lands have been developed into No. 1 during the years 1927, 1928 and 1929; would that indicate to you as an operator the necessity of having gas reserves? A. Yes. It would also confirm just what I said a moment ago that this acreage is converted into No. 1 as soon as it is drilled."

A. B. Dally testified:

(R., 1121.) "Q. Could a company be financed or successfully managed if it only had No. 1 acreage? A. It could not. Bankers will not go into it unless you have reserves, which must be in acreage held that is nearby or prospective in character for finding gas. You can't finance these big investments unless you do.

Q. Assuming that the company were financed and had only No. 1 acreage, could it successfully conduct a public utility business in Ohio? A. It could not."

That the situation was made plain to the commission is shown by the commission's ruling to an objection as follows:

(R., 1122.) "Commissioner Geiger: As I understand, their view of the matter is that unless they have an adequate reserve to exhibit to their bankers they couldn't finance the acreage that was really producing gas; they must have a background of a reserve in order to finance the enterprise.

Mr. Turner: And we go one step further than that, your Honor; and this last question is whether or not

the company itself as a practical operating problem could successfully operate only No. 1. You see you can't wait until a well runs dry to get new gas.

* * * * * * * * * * * * * *

(R., 1123.) "Q. Is it necessary to take in Classes 2, 3 and 4, or either of them? A. It is necessary to have all the classes support a big undertaking in a public utility or otherwise in the natural gas business.

Commissioner Geiger: You don't believe the Supreme Court of Ohio was right when they said we shouldn't permit them?

The Witness: Well, Judge, I don't believe so because I know we need acreage and production away ahead, and good management dictates we should have it. It isn't worth while unless you have it."

(R., 1119.) "Q. You are a practical gas man. I want to find out from you, if I can, the amount of this acreage that is necessarily used and useful to The Ohio Fuel Gas Company in supplying gas throughout Ohio? A. Do you refer to the entire acreage?

Q. Yes, sir; what part of it is used and useful? A. I believe that it is all necessary to support the demands for gas throughout this system.

Q. Are Classes Nos. 2, 3 and 4 necessary for the continuance of the life of the business of The Ohio Fuel Gas Company?"

After objection had been overruled, the question was restated:

(R., 120.) "Q. It is all used and useful; is that correct? A. That is correct."

(R., 120.) "Q. (to Mr. Dally by Commissioner Geiger): You would probably agree that the acreage which is being used that is developed with gas

is more useful than that in reserve? A. It is much more useful but the other is necessary to follow up to support the business that has been established."

(R., 1123.) "It is necessary to have all the classes support a big undertaking in a public utility or otherwise in the natural gas business, in my opinion."

George Wittmer, Jr., who had been in the natural gas and oil business since 1905, testified:

(R., 1194.) "Q. Are you able to state whether or not the Nos. 2, 3 and 4 leaseholds are essential to the business of The Ohio Fuel Gas Company? A. Absolutely, yes.

Q. Are you able to state from your experience in the gas business, and I understand you to have said that you have been in the utility as well, whether or not the Nos. 2, 3 and 4 or either of them are necessarily used and useful in the supplying of gas by such a company as The Ohio Fuel Gas Company?"

After objection the witness was allowed to answer the question:

(R., 1195.) "A. They are very necessary."

Commissioner Geiger asked Mr. Wittmer:

(R., 1197.) "Q. Where would you draw the line on the amount of acreage that The Ohio Fuel Gas Company would necessarily have to have to operate its business? A. I can't say. All companies carry reserves in 2, 3 and 4 for certain purposes. Some companies would carry very much more than others. I can't answer that.

Q. But it is convenient for you to say that at least the amount that is involved here would be

necessary? A. I would say that when we were a utility we had a greater proportion of untested acreage. I don't believe that I have the figures with me but we carried a very large reserve of 2, 3 and 4 over No. 1."

Dan S. Webber testified:

(R., 1302.) "Q. What do you, from your experience in the gas business, say is used and useful property of these four classifications to The Ohio Fuel Gas Company in the distribution of gas throughout Ohio? A. I consider all of this acreage is in use to the company.

Q. Do you know whether since June, 1929, any of the other classes of property than No. 1 had been drilled? A. I do.

Q. What classes had been drilled, to your knowledge? A. All four classes.

Q. Tell us some of the places where the No. 4 has been drilled? A. Northeastern Ohio, in Summit and Stark counties and in Geauga county."

(R., 1303.) "Q. Is that near the Brendel property? A. Yes, sir.

Q. All right, give us some more counties in which No. 4 has been drilled, to your knowledge? A. Muskingum; Tuscarawas; further to the west, I believe, in Ashland county and throughout the state, throughout the territory.

Q. Do you know whether they have gotten any gas in No. 4 territory? A. Oh, yes.

Q. And have they gotten any gas in No. 3 territory since the appraisal that you made? A. They have.

Q. And No. 2? A. Yes, sir.

Q. (By Commissioner Geiger): Let me put a question right now. Do you know they have drilled in other places 2, 3 and 4?

The Witness: Yes, sir.

Commissioner Geiger: And discovered gas?

The Witness: Yes, sir."

Mr. Weymouth testified:

(R., 1381.) "Q. Is it your experience as an operator that you can drain some of the No. 2 territory through No. 1? A. Yes, you can.

Q. If you didn't have the No. 2 territory, what would be the fact as to the necessity of drilling many off-set wells to protect your No. 1? A. It is a fact that you would be compelled to drill a great many off-set wells."

(R., 1382.) "Q. Isn't it always true that when you develop acreage somebody else attempts to lease the adjoining property? A. That has been the invariable experience of everybody in the gas business.

Q. And hasn't it been the experience in the gas business that unless you take that adjoining property, it will be drilled and your gas taken? A. That is correct."

Commissioner Geiger asked A. B. Dally, a witness with more than thirty-five years' experience in the natural gas business:

(R., 1137.) "Q. Well, now, the crucial question with us is, why can you say it is that acreage No. 2, out of which no gas is being drawn in any considerable portion and out of which none has heretofore been drawn, is property used and useful in the present gas operation? Is it simply because it forms a reserve for future years and that it also forms a basis upon which money may be borrowed?

The Witness: In my opinion it forms the reserve for backing No. 1, being next to it, and is as neces-

sary as No. 1, and I would put the next Class 3 as a reserve to support both of them in the operation of a large gas industry—No. 3 and No. 4.''

Dan S. Webber, a practical gas man of many years' experience, testified:

(R., 1302.) ''Q. Mr. Webber, why do you say that No. 2 is partially depleted? A. Because of its contiguity to No. 1 and having been in use with No. 1 and a certain amount of the gas taken from it.

Q. In other words, being taken now though it is not drilled? A. Yes, sir.''

The evidence in this case shows that there were many other companies in Ohio in the same plight as the Columbus company found itself in 1914—with transmission lines and a distribution system but without any gas reserves. They had exhausted their reserves and were without means to acquire more. (R., 1052; Co. Ex. 57, pp. 8-9.)

Operating Expense Account 360 of the Uniform Classification of Accounts prescribed by the Public Utilities Commission of Ohio provides:

''Charge to this account the amount of rent accrued during each accounting period on gas leases which are being held by the utility for future production of natural gas.''

Had the commission given consideration to Account 360—always heretofore recognized in natural gas rate cases—the following adjustments would have to be made in the findings of both the majority and minority of the commission:

Delay Rentals.

Taking up the majority findings first: There would be added to Sheet 3 of Exhibit "B" (R., 181) under "Production Expenses" Account No. 360, Delay Rentals, $1,684,913, which would change the total of production expenses on said sheet to $2,973,501. Substituting this figure for the production expenses on Summary Sheet 1 of the same exhibit would make the item on that sheet "Total expenses and return" $22,592,755. Dividing this total by the total sales of the Ohio Fuel as shown on the same sheet, 53,579,575 M c. f., produces a gate price of 42.1667 cents per M c. f. Substituting this gate price on Sheet 1 of Exhibit "C" (R., 182) under "Expenses and Return on Investment" makes the item "Purchased gas —from Ohio Fuel Gas Company" @ 42.1667¢ per M c. f. (5,955,221) $2,511,120, which increases the item "Total expenses and return" on this same sheet to $3,309,484. Dividing this last amount by the total Columbus sales as shown on the same sheet—5,671,639 M c. f.—gives Columbus a retail rate of 58.351 cents instead of 55.049 cents as computed, or 55 cents as allowed by the majority.

Pursuing the same treatment of the same sheets of Exhibits "B" (R., 218) and "C" (R., 220) of the minority commissioner's findings will produce the following results:

To Sheet 3 of Exhibit "B" is added under "Production Expenses," Account No. 360, Delay Rentals, $1,684,913, which changes the total of "Production expenses" to $2,973,502. Substituting this total for the item "Production expenses" in "Expenses and Return on Invest-

ment'' on Sheet 1 of Exhibit ''B'' changes the item ''Total expenses and return'' to $18,670,087. Dividing this by the Ohio Fuel sales—53,579,575 M c. f.—gives a gate price of 34.845 cents. Substituting this gate price on Summary Sheet 1 of Exhibit ''C'' makes the ''Purchased gas—from Ohio Fuel Gas Company'' @ 34.845¢ per M c. f. (5,955,221) $2,075,097, and the item ''Total expenses and return'' $2,906,851. Dividing this last amount by the total Columbus gas sales—5,671,639 M c. f.—produces a retail rate of 51.252 cents instead of 47.95 cents.

A (4) DEPRECIATION.

In the course of its opinion the commission said (R., 160):

> ''Counsel for the city say on page 346: 'In the light of the experience of Ohio Fuel as shown by these figures, Blundon's total annual reserve charge of 3.6% per year amounting to $2,848,301.74 is a generous allowance.' ''

At page 12 of City Exhibit 74, the city sets up an annual allowance for depreciation at the rate of 3.6% or a total amount of $2,848,301.74. Notwithstanding this the amount allowed for annual depreciation by the minority commissioner and approved by the court below is $1,765,607.00, as shown on Sheet 1 of Exhibit ''B''. (R., 217.)

Had the minority commissioner allowed the annual de-

preciation conceded by the city, his gate price would have been 33.721 cents instead of 31.70 cents.

Carrying this gate price to summary Sheet 1 of Exhibit "C" of the minority commissioner's findings (R., 220) would result in a retail rate of 50.07 cents per M c. f instead of 47.95 cents.

Under II B (4) below—**Annual Allowance for Depreciation,** we have discussed the effect of the failure of the commission to make any annual depreciation allowance on general overheads.

Under II B (1) below—**Taxes,** we have discussed the insufficient allowances for taxes for both the Ohio Fuel and appellant.

A (5) THE WEST VIRGINIA PROPERTY.

The majority of the court below held (R., 51):

> "In the valuation of a public utility by the Public Utilities Commission, the fact that certain service of the utility consists in the delivery and sale of gas produced in another state does not justify the application of the law of such other state to the facts found. Pertinent facts with reference to the value of the property of a public utility used and useful in the service of a community in this state are governed by Ohio law."

We contend that the foregoing holding by the court below is not consonant with comity or law. Before such a proposition of law could be considered sound it would have to be based upon the assumption that a municipality in the state of Ohio could claim the dedication of

property located in West Virginia to a public use in Ohio.

The Columbus company does not purchase any gas from the West Virginia company. The Ohio Fuel Gas Company, from which the Columbus company purchases its supply, does purchase approximately 29 per cent. of its supply from the West Virginia company at the Ohio river. This West Virginia gas is mingled with the Ohio gas and not delivered except as mingled.

As was said by Chief Justice Hughes in the case of **Smith v. Illinois Bell Telephone Co.**, 282 U. S., 133-148:

> "The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of competent governmental authority in each field. * * *
>
> The proper regulation of rates (p. 149) can be had only by maintaining the limits of state and federal jurisdiction, and this can not be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. * * * (p. 151). This does not alter the fact that the Illinois business is to be treated as a segregated enterprise. If a single individual or corporation, having a number of technical staffs, engaged directly in local public services within several states, each state would be entitled to regulate the transactions within its own domain according to its own conception of public policy, provided there were no infringement of the fundamental rights guaranteed by the federal Constitution, and, if the latter were invoked by reason of the action of any state, it would still be necessary to consider the local enterprise separately and to make what-

ever apportionments were necessary in that view. The corporate organization of the Illinois company not only created a legal person amenable as such to governmental authority, but facilitates the examination of the particular transactions subject to that authority. The question presented in the present case is not one of the abuse of inter-corporate relations, or of domination or control affecting the integrity of the direction of the affairs of the Illinois company, but of alleged confiscation through prescribed intrastate rates."

In common with neighboring states, Ohio procures a part of its natural gas supply from the states of West Virginia and Kentucky.

The commission disregarded entirely the contract covering the purchase of this out of state gas (Co. Ex. 58, R., 2915) and proceeded to adopt the valuation and expense allowances made by the Public Service Commission of West Virginia in a rate case pending before that commission involving the property in question. (Co. Ex. 78, R., 2950.) The Ohio commission had received in evidence a transcript of all of the testimony taken and exhibits admitted before the West Virginia commission in said rate case. (R., 141.) In considering the expenses to be allowed in the fixation of West Virginia rates, the West Virginia commission (R., 2963; Co. Ex. 78, p. 21) had allowed the cost of carrying reserve leaseholds and 4.15 per cent. for amortization, both of which allowances had been approved by the Supreme Court of Appeals

of West Virginia in the case of **City of Charleston, et al. v. Public Service Commission,** 110 W. Va., 245, 159 S. E., 38. (City Ex. 30, R., 3020.)

The Supreme Court of Ohio held that even though all of the property in question was located in the state of West Virginia and was used to serve consumers in the state of West Virginia as well as in other states, said property should be valued and the expenses connected therewith should be allowed only in conformity with the laws of Ohio as interpreted by the court below, which laws as so interpreted were contrary to the laws of West Virginia as interpreted by the court of last resort of that state in the case of **City of Charleston, et al. v. Public Service Commission, supra.**

If the holding of the court below be followed it will tend to make West Virginia rates confiscatory. As was held by the West Virginia Public Service Commission in Case 845—Re United Fuel Gas Company, P. U. R., 1920-C, p. 584:

> "Although the commission has no jurisdiction over rates for natural gas sold outside the state, yet the return from such rates must be considered in fixing local rates so as not to require local consumers to pay more than a fair proportion of the aggregate earnings the utility is entitled to receive."

In the case of **Charleston, et al. v. Public Service Commission, et al.,** 95 W. Va., 91, it was held that if United Fuel Gas Company sold natural gas to its related companies at less than the fair market rate it should be treated as if it had received the fair market rate for such gas.

West Virginia Property.

The contract between United Fuel Gas Company and The Ohio Fuel Gas Company, which was made in conformity with the holdings of the courts, both state and federal, and which was entirely disregarded by the court below, will be discussed under a separate heading.

The action of the commission reduced the annual revenue of the West Virginia company from sales to The Ohio Fuel Gas Company $759,200 per year below the price for which the West Virginia company sells its gas to the Hope Natural Gas Company (Co. Ex. 59, R., 2920) and other unrelated companies.

The action of the court below results in reducing the annual revenue of the West Virginia company from sales to The Ohio Fuel Gas Company $1,348,849.58 below the price for which said company sells its gas to said Hope and other unrelated companies.

Proof: Ohio Fuel purchases 15,486,218 M c. f. from United. Difference between Hope and Ohio Fuel contracts (Co. Ex. 58 and 59, R., 2915; 2920) 26.5¢ and majority river price is 4.46¢ per M c. f. (26.5—22.04=4.46). Difference between said contracts and court river price is 8.71¢ per M c. f. (26.5—17.79=8.71).

The difference between the Columbus retail rate of 55 cents fixed by the commission and reversed by the court and the 48 cent rate proposed by the minority commissioner and affirmed by the court is due principally to the difference in treatment of

(1) the West Virginia expense allowances to produce what is known in this case as the "river price,"

(2) the allowances for depletion, amortization and depreciation on the Ohio production and transmission property (treated under "Depletion—Amortization").

The Ohio commission unanimously adopted a valuation made by the Public Service Commission of West Virginia of the out-of-state property in question, with the exceptions

(a) that no correction was made for the difference between market value and book value of leaseholds,

(b) the difference caused by the application of the depletion method of depreciation to gas wells was disregarded, and

(c) no allowance whatever for going concern value.

All of these exceptions were contrary to the findings of the Supreme Court of Appeals in the case of **City of Charleston v. Public Service Commission**, 110 W. Va., 245, in which case the court had reviewed the valuation made by the Public Service Commission of West Virginia. (R., 3020.)

In the matter of operating expenses and return the majority of the Ohio commission followed the allowances made by the West Virginia commission. The minority commissioner followed the operating expense allowances of the West Virginia commission, except that he eliminated the West Virginia commission's allowance for amortization and lease rentals. He also reduced the West Virginia allowance for return to 6½ per cent.

The majority arrived at a river price of 22.04 cents per M c. f., while the river price found by the minority was 17.79 cents. By reason of the fact that the West Virginia gas is mingled with a greater amount of Ohio gas before it reaches the Columbus gate, the difference in

the Columbus gate price between the majority and the minority amounts to 1.2284 cents per M c. f.

The allowances for West Virginia purchased gas of both the majority and the minority are found on Sheet 1 of Exhibit "B" of their respective findings. (R., 179; 217.)

The majority allowed for the West Virginia purchased gas.....	$3,413,162.00
The minority allowed for the West Virginia purchased gas.....	2,754,998.00
Making a difference of.....	$658,164.00

As the total deliveries of The Ohio Fuel Gas Company (Sheet 1, Exhibit "B"—both majority and minority) amounted to 53,579,575 M c. f., there was a difference in the Columbus gate price of 1.228 cents between the majority and minority on account of the difference in the river price for the West Virginia gas.

Had the West Virginia contract (Co. Ex. 58, R., 2915) been recognized or had the same price been allowed as was paid by the Hope and other unrelated companies to the United, the allowance for West Virginia gas purchases on Sheet 1 of Exhibit "B" of both the majority and minority findings of the commission would have been $4,103,848. This would have increased the item "Total expenses and return" on Sheet 1 of Exhibit "B" of the majority findings to $21,598,528, which divided by the total sales of the Ohio Fuel shown in the same sheet, 53,579,575 M c. f., would have produced a Columbus gate price of 40.31 cents instead of 39.02 cents.

West Virginia Property.

Applying this gate price to the majority's Sheet 1 of Exhibit "C" would make the purchased gas expense $2,400,550 and would increase "Total expenses and return" to $3,198,914. Dividing this by the gas sold, 5,671,639 M c. f., gives a retail rate of 56.40 cents.

Making the same correction on Sheet 1 of Exhibit "B" of the minority findings, the item "Total expenses and return" would have been $18,334,024, or a Columbus gate price of 34.22 cents instead of 31.70 cents.

Applying this gate price to the purchased gas expense of the minority's Sheet 1 of Exhibit "C" increases this item to $2,037,877, which in turn increases the item of "Total expenses and return" to $2,869,631. Dividing this last total by the amount of gas sold shown on the same sheet, 5,671,639 M c. f., gives a retail rate of 50.60 cents.

In other words, recognizing the controlling significance of the contract for the West Virginia gas, it would take 2.60 cents more than the 48 cent rate to produce a 6½ per cent. return, without any regard to the omission of other expense items, such as lease rentals and depletion.

A (6) ALLOCATION OF EXPENSES.

As the allocation of expenses is based upon allocation of value, we have discussed both subjects under the heading **B (10) Allocation.**

B (1) MARKET VALUE OF LEASEHOLDS.

As was said by Judge Jones in his dissenting opinion below (R., 73):

> "The decision, by considering book values as a basis of valuation, in face of overwhelming expert testimony establishing higher values, is, in that respect, erroneous."

Paraphrasing the language of Mr. Justice Stone, in **United Fuel Gas Co. v. Railroad Commission,** 278 U. S., 316, examination of the testimony will disclose that the estimates of market value **were** based on prevailing prices for gas leaseholds and/or actual sales of such leaseholds.

The question here is whether market price, i. e., the price which a willing buyer will pay to a willing seller, shall be considered in fixing the value of a gas company's gas leaseholds, or whether such utility is limited to the book value of such property.

The commission said (R., 153):

> "Witnesses have been produced by the company who have testified that productive acreage is worth in the market all the way from $39.34 to $100.00 per acre. And they have also testified that there have

recently been within reasonably close territory actual sales of acreage at a definite valuation."

The court below held (R., 63):

"* * * we hold that the value of Class No. 1 leases should be reduced to book value, and reduced to the book value of Class No. 1 leases alone."

The valuation evidence of the company's witnesses is tabulated at page 19 of Exhibit 44 (R., 2910), and is as follows:

For the No. 1 (operated) leaseholds:

A. B. Dally, Jr.	$90.00 per acre, total	$26,225,640.00
George Wittmer, Jr.	74.90 per acre, total	21,825,000.00
S. W. Meals	60.00 per acre, total	17,483,760.00
D. S. Webber	39.37 per acre, total	11,473,717.00

The commission found the value to be $7,284,900.00 book value, which the court ordered to be reduced to the book value of the No. 1 only.

A. B. Dally, Jr., has been engaged in the production and sale of natural gas and oil for more than thirty-five years. (R., 346.) He is president of the Penn-Ohio Gas Company (R., 346), which company has approximately 60,000 acres of gas leaseholds in Ashtabula, Trumbull, Stark, Summit, Tuscarawas, Licking, Jackson, Morgan, Monroe, Noble and Lawrence counties—in each and all of which counties The Ohio Fuel Gas Company also has gas leaseholds.

George Wittmer, Jr., has been engaged in the natural gas and oil business since 1895. His company holds

100,000 acres of gas leaseholds in Ohio. (R., 351.) These gas leaseholds are located in Monroe, Muskingum, Perry, Vinton, Coshocton, Licking and Stark counties. The Ohio Fuel Gas Company also has gas leaseholds in each of these counties.

S. W. Meals has been engaged in the natural gas business for over forty years. He is president of the Carnegie Natural Gas Company. (R., 355.) At the time of his cross examination he was interested in about half a dozen leases in Ohio. These leases were located in Perry county (R., 356), where The Ohio Fuel Gas Company also has gas leaseholds. The Carnegie Natural Gas Company, of which Mr. Meals is president, formerly had a block of leases between Cleveland and Lorain.

D. S. Webber has been engaged for many years in buying and selling gas and oil leaseholds in Ohio. (R., 359.)

There is no other evidence on leasehold valuation. The city did introduce some fantastic figures called "reproduction figures" and "cost figures" made up by the witness Blundon, who never bought or sold or knew of a single gas leasehold sale in the state of Ohio. (R., 1417; 1439.)

The court below held (R., 62):

> "No valuation can be based upon market price because of the fact that there is no market for gas property so extensive as that of The Ohio Fuel Gas Company."

There is no evidence whatever to support this holding. We are not here referring to the weight of the evidence, but to the fact that there is no such evidence. The only witnesses who testified on this subject were company witnesses. In argumentative questions and statements by counsel for the city during the cross examination of the company's witnesses, counsel for the city made the contention that there was no market.

The substance of the evidence hereinafter set out is:

(a) There is a market for all of the leaseholds of the company.

(b) Other sales are shown.

(c) The prices placed on the leaseholds are what a willing buyer would pay a willing seller and are not dependent upon the regulated price of gas.

(d) The appraisers had all the data that a prospective purchaser would want.

(e) The leases of the company are interspersed with the leases of other companies and individuals.

(f) The leaseholds can be sold at the prices set forth for the purpose of furnishing gas as a competitive fuel.

(g) There is a market outside of Ohio for the gas obtained from these leaseholds.

(h) The valuation was made in accordance with the practices of the industry.

The witness D. S. Webber, whose business is that of buying and selling gas and oil leaseholds in Ohio (R., 359), testified:

(R., 1308.) "Q. I will ask you to state whether or not on or about June, 1929, there was a market for

such gas leaseholds in the state of Ohio. A. There was."

On cross examination Mr. Webber was asked (R., 360):

"Q. In other words you do buy and sell some on your own account aside from being a broker in leases; is that right? A. Well, yes; I own and I lease and I sell, and then I option and buy gas properties and put them together and sell them to investors."

At pages1251-1252 of the record, Mr. Meals was asked:

"Q. Was there any market for natural gas leases in Ohio on or about the thirtieth day of June, 1929?

The Witness: There was a market for acreage of that amount at that time."

Mr. Dally was asked and answered as follows:

(R., 1129.) "Q. They have been asking questions here that indicated that they didn't think there was any market for natural gas properties. Is there a market for natural gas property such as this? A. There is."

(R., 347.) "Q. What experience have you had personally in leaseholds, gas leaseholds in Ohio, within the last few years? A. Well, in the time I have been in the business, it was a considerable amount of land, some of it myself personally and had it leased in the companies I have been with.

Q. I am speaking now, of course, of Ohio? A. In the state of Ohio, yes, sir, extending over thirty years, that length of time or, more properly speaking, twenty-eight years ago, I had an acreage of something like two hundred thousand acres leased up in this state.

Q. And when after that were you interested in any sizeable acreage? A. Up until the present time through the companies."

(R., 1129.) "Q. Could you get an offer for all of this property? A. Well, give me time enough and I think I could.

Q. Well, can you get an offer within twenty-four hours for it? A. I believe I could."

Mr. Wittmer testified that he bought and sold gas leaseholds in Ohio. (R., 351.)

At R., 1196, Mr. Wittmer was asked:

"Q. Could you have sold those gas lands numbered 1, 2, 3 and 4 as of June 30, 1929?"

Objection was sustained to the question.

On recross examination at R., 1197, Mr. Wittmer was asked and answered:

"Q. Necessarily, Mr. Wittmer, where you have such a large acreage the number of possible buyers so-called is necessarily reduced, is it not? A. Yes, but it is all the more attractive."

At R., 1177, Mr. Wittmer was asked by the city's attorney on cross examination:

"Q. Did you, as of June 30, 1929, know of any sale in Ohio in the immediate past before that date of leasehold acreage in any way comparable in size, etc., with the whole leasehold acreage under consideration here? A. I know of quite a number of smaller size."

At R., 1222, Mr. Meals testified on cross examination:

"Yes, sir; after going over their maps and finding the locations of the producing wells, the general

trend of this territory that they asked us to value, and with my experience that I have had in buying and selling, and my knowledge of sales, I think I was able to put a valuation on it."

Appellant offered Company Exhibit No. 140 (R., 2989), which was a written offer from the Benedum-Trees Oil Company of thirty million dollars cash for the gas leaseholds of The Ohio Fuel Gas Company. This was not admitted by the commission and was ignored by the court.

The evidence showed (R., 1132; 1195; 1307) that the Benedum-Trees Oil Company was responsible.

As to Sales.

At R., 1308, Mr. Webber testified:

"Q. Have there been sales of leaseholds in Ohio? A. There have.

Q. Over what period of years have there been sales of leaseholds of gas lands? A. Ever since I have known anything about the production of gas.

Q. Down to now? A. Down to now."

At R., 1284:

"* * * We know acres have sold at a much higher price than I have put in this, in small lots; and investors in 1929 were looking for these big ones. I would have been delighted to have had that as a $38,000,000 proposition. They wanted to look at things of five million or better. I have inquiries now for territories of good size, getting them ready for later offers."

Mr. Meals testified at R., 1252:

"Q. You were asked if you knew of any sales in the immediate past, and were limited in your an-

swer to the size of the holdings of The Ohio Fuel Gas Company; now I ask you to tell the commission of any sales that you know of of gas leaseholds in Ohio."

After objection and argument the witness was permitted to answer at R., 1252:

"The Witness: Yes, I know of a sale that was made since 1929, quite a large sale right in your territory in Summit and Stark counties."

(R., 1253.) "The Witness: In the immediate past, yes; but the property that I refer to is the property in Summit and Stark counties that Sam Brendle sold to the (East) Ohio Gas Company.

Q. How recently? A. Six or seven months ago.

Q. Do you know what he got for the operated acreage?"

After objection and argument the witness answered (R., 1253):

"A. He got in the neighborhood of two million and a half dollars, in addition to the cost of his operation.

Q. For how many acres? A. Something like 21,000.

Q. How many were what we classed here as No. 1? A. The majority of that acreage would come in under Class 2.

* * * * * * * * * * * * *

Q. Now, do you know of any other sales in the immediate past?

The Witness: Oh, I have knowledge of these sales that have been made that the other witnesses have testified to, of course."

(R., 1254.) "Q. Something was said yesterday about William Hunter Atha's leaseholds over in

Muskingum county. Do you know anything about their valuations? A. I am associated with a party who has been dickering to purchase the acreage, and wells that he has over there. I think we made them an offer on them."

At R., 1255, we show that Mr. Meals had offered $200 an acre for 7000 acres of gas lands in Muskingum county, of which from 1200 to 1300 acres was No. 1, and the balance No. 2. This offer was refused, the owner holding out for $250 an acre. This testimony was stricken from the record over our objection and exception.

Attention has elsewhere been called to the offer of the Benedum-Trees Oil Company of thirty million dollars for The Ohio Fuel Gas Company's leaseholds (Co. Ex. 140). (R., 2989.)

On cross examination Mr. Dally was asked at R., 1142:

"Q. You were asked concerning the so-called Cashdollar sale; when did that sale take place? A. The latter part of 1928.

Q. And how much acreage was involved in that? A. The total acreage involved at the time of purchase was something above 102,000 or 103,000 acres —thereabouts.

Q. And how much of that was operated acreage? A. About 11,000 or 11,500."

At page 1130 Mr. Dally testified that the average price for the Cashdollar leaseholds was between $75.00 and $80.00 per acre.

On cross examination (R., 1197) Mr. Wittmer testified:

"Q. Necessarily, Mr. Wittmer, where you have such a large acreage the number of possible buyers

so-called is necessarily reduced, is it not? A. Yes, but it is all the more attractive."

At page 1207 Mr. Wittmer was asked on cross examination:

"Q. How much acreage in Ohio have you bought and sold? A. 60,000 acres to the Philadelphia company; 101,000 acres to the Penn-Ohio; 7000 in Muskingum, 5300 in Vinton; 173,300.

Q. And these were independent sales at different times? A. Yes."

At page 1182 Acting Chairman Geiger asked Mr. Wittmer:

"Q. Well, right there let me ask you a question; assuming they could be sold for the prices that you have set upon them, then the Ohio Gas Company would have more money than they had put in them, they would have made a profit. Now, out of what have they made that profit; is it out of the fact that they have gathered together a great group of lands and hold it as a practical monopoly, or does it grow out of something else? They are going to make some money if they sold it at that amount; they would make considerable sums of money, wouldn't they? A. They can't afford to sell those leases because it would be giving up their protection, their reserve."

At page 1189 will be found the following testimony (Mr. Wittmer):

"Q. Now, you have been asked about sales in Ohio. I wish you would tell the commission any sales that you know that were made in 1929 in the state of Ohio? A. In 1929 we sold to the Penn-Ohio

Gas Company about 101,600 acres for $1,200,000, and included wells and leases located in Jackson, Lawrence, Carroll, Stark, Guernsey, Monroe, Morgan, Summit, Licking, Noble and Gallia counties. This property included 4000 acres of No. 1 classification, about 4600 acres of No. 2; 93,000 acres of No. 3. The prices that we used at that time—''

Amid the objections Mr. Wittmer stated that the price for No. 1 was $150.00 an acre; for No. 2, $20.00 an acre; for No. 3, $3.00 an acre.

At page 1189 he testified:

''Q. Now, did you buy any acreage in the state of Ohio during the year 1929? A. We bought 7000 acres in Muskingum county, Ohio, for $100,000.''

At page 1190 the witnes sstated that of the 7000 acres it was practically undeveloped excepting 50 acres.

(R., 1193) ''Commissioner Geiger: I know; but how much did you get for the wells?

The Witness: $115,000.00.

Q. (By Commissioner Geiger): That is you got what was put into the wells in addition to $150.00 an acre? A. Yes.

Q. How about Vinton county; do you know of any sales in Vinton county in the past few years? A. In 1930 we bought 5300 acres with three gas wells. We paid $16,000.

Q. Was that in developed or undeveloped territory? A. Practically undeveloped.''

(R., 1194.) ''Q. (By Commissioner Geiger): What was that an acre; give the value per acre. A. About $30.00.

Q. How many acres? A. 5300.

Q. What is the fact as to whether or not a large tract of gas lands is worth more per acre than a

smaller tract of gas land? Answer and amplify your answer to suit yourself and explain that to the commission. A. A large area of leaseholds would be looked upon with very much more favor than a small tract, because it would carry with it possibilities in the way of supplying needed markets, continued development work that would be carried on."

Willing Buyer—Willing Seller.

At R., 1167, Mr. Wittmer testified on cross examination:

"Q. Well, I would like, if I can, to get your mathematics on your No. 3, to get how you arrived at the $10.00 per acre for No. 3 acreage, making a total of $3,120,000 on 312,631 acres. How did you arrive at that? A. We would be willing to pay or we would be willing to sell acreage of that kind in our dealings with the gas companies and with individuals; I arrived at that figure.

Q. You arrived at that then from the standpoint of what you or your company would be willing to do; is that right? A. Yes, that was one of the factors.

Q. Well, what other factors? A. Any other company.

Q. Your judgment is that any other company would be willing to do the same thing that you would do? A. In my judgment, other companies have done so, and we have done so."

At page 1188 Mr. Wittmer was asked:

"Q. Do I understand you in answer to Mr. Davies to say that the prices given here on page 19 of this Exhibit 44 were what you believed that a willing purchaser would pay to a willing seller on or about the thirtieth day of June, 1929, for these gas land leases? A. They are."

At page 1222 Mr. Meals testified:

"Yes, sir; after going over their maps and finding the locations of the producing wells, the general trend of this territory that they asked us to value, and my knowledge of sales, I think I was able to put a valuation on it."

At page 1092 Mr. Dally testified on cross examination:

"Q. Do you consider that the information that was furnished you was complete for the purpose? A. I do.

Q. If you were a prospective purchaser would you expect any further or more information than was submitted to you? A. No, sir; I think that would be complete for that purpose."

At page 1161, Mr. Wittmer was asked on cross examination and answered as follows:

"Q. What information was furnished to you by the company for the purposes of the appraisal? A. Well, it was rather voluminous. The material that you have on the table here I guess covers it pretty well. I could not recite the titles, etc., of the different volumes; it is very voluminous though, a great deal more information than the average gas man would need for that purpose.

Q. Well, would you consider the information that was furnished to you was quite complete for the purposes of appraisal? A. Very complete.

Q. Would you consider that they were quite as complete as would at all be necessary or be required by a prospective purchaser? A. Yes, they would.

Q. In considering a purchase? A. Yes.

Q. You would not desire any further information either for the purposes of the appraisal or for the purposes of a purchase, would you? A. Not any further information. I might want to make an examination of every well."

At page 1226, Mr. Meals testified on cross examination:

> "Q. And you feel that you were furnished with all the information that was necessary for you to have in order to make this appraisement? A. Yes, sir, I think the information is sufficient to make a valuation on it.
>
> Q. Is it all the information you would desire if you were to be a prospective purchaser? A. Yes, sir."

At R., 1282, Mr. Webber was asked on cross examination:

> "Now, in making your values per acre, how did you convert that information into dollars?"
>
> "A. Why, I analyzed the properties in the way that I have stated, and then I view them from my standpoint as a whole, and what I could go to a willing buyer and offer them for and receive from him for them without any question of a doubt. I arrived at this valuation of $38,614,600."

The commission offered two excuses for not using market value:

(1) Monopoly; and

(2) That market price could not be fixed because the rates were in the control of regulatory bodies.

(1) As to the Monopoly Feature:

Company Exhibits 139, 142, 143 and 144, which include all of The Ohio Fuel Gas Company's acreage, show that the same is located contiguous to leaseholds owned and operated by others. These exhibits and all of the evidence in the case show that The Ohio Fuel Gas Com-

pany territory is interspersed or checker-boarded with the gas leaseholds of others, and that natural gas may be and/or is transported from all such production territories to markets other than those supplied by The Ohio Fuel Gas Company.

At page 1165, the witness Wittmer testified:

> "All of our leaseholds are checker-boarded more or less with the Ohio Fuel and the East Ohio Company."

(R., 1179.) "We were leasing in the same counties that they (Ohio Fuel) were at the same time."

At page 1202, Chairman Geiger asked the witness Wittmer:

> "Q. Well, now, the land that you have colored upon this map, is that under lease to this company? A. It is my understanding all that—
>
> Q. (By Commissioner Geiger:) Now, in between there a large number of townships and a large piece of territory that are not colored. Do you know whether or not those are gas producing lands; are they held by some other company? A. By some other companies.
>
> Q. So that the block if it were filled in with all producing lands would be colored solidly all the way down? A. That is correct."

(R., 1211.) "Q. There is one question that I would like to ask this witness before he goes home; I want to ask you whether or not The Ohio Fuel Gas Company controls all of the gas territory in this belt across the state here as indicated on this map, or whether there is any competition there with them? A. It is competitive. So far as I know it is entirely open; many different companies, individuals and companies, are operating through that territory.

Q. I want to develop whether or not The Ohio Fuel Gas Company has a monopoly of the gas in that territory? A. Oh, no.

Q. (By Mr. Davies, city attorney:) Is there any other big gas company in that territory to which Mr. Turner has just directed attention? A. The East Ohio."

At page 1307, the witness Webber testified:

"Q. What is the fact as to whether other gas companies own gas lands in this territory shown on the map, Company Exhibit 139? A. Several other companies own territory in the same field."

At R., 1130, the witness Dally testified:

"Q. How many operating gas companies are there in Ohio, do you know? A. Why, I don't know, but possibly four or five hundred easily."

As has been pointed out in the testimony quoted above, the Penn-Ohio Gas Company has approximately 60,000 acres of gas lands in a part only of the territory in which the Ohio Fuel operates; while one of Mr. Wittmer's companies owns 100,000 acres in another set of counties in which the Ohio Fuel operates. Meals testified that he owned leaseholds in Perry county, and that his company formerly owned a large block of leases in northern Ohio, where the Ohio Fuel operates.

(2) As to Regulated Prices:

At page 339 of the bureau of mines pamphlet (Co. Ex. 206) is the following statement:

> "The rapid growth in the distribution of natural gas during 1929 greatly stimulated public interest in natural gas pipe lines, particularly in maps showing the size and location of the lines. To meet this demand the bureau of mines compiled and issued a complete up to date map of natural gas lines as of July 1, 1929. The supply of this map has long been exhausted, but the principal lines as of a more recent date have been incorporated in a smaller map.
>
> On July 1, 1929, natural gas trunk lines traversed 29 states. The estimated mileage was distributed among the states as follows:"
>
> (Then follows a tabulation showing the distribution of 40,800 miles of trunk lines.)

Ohio gets approximately one-half of all the natural gas produced in the state of West Virginia, which is equal to 118 per cent. of the natural gas produced in the state of Ohio. (See bureau of mines pamphlet, Co. Exs. 20 and 206.)

In the case of **State of Ohio v. State of West Virginia,** 262 U. S., 553, this court held that the transmission of natural gas from one state to another for sale and consumption in the latter is interstate commerce, and held unconstitutional an act of the state of West Virginia which sought to restrict the sale of gas for use outside of the state of West Virginia until all of the demands of West Virginia consumers had been supplied.

At page 596 this court said:

> "A state law, whether of the state where the gas is produced or that where the gas is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce—a prohibited interference."

Our witnesses on valuation testified that both the operated and reserve acreage were worth the valuations they put on it without any reference to regulated prices in Ohio. They testified that the Ohio gas could be easily sold in Detroit, in Buffalo and other points outside of the state. They testified that the leaseholds were worth the prices they put upon them were the gas to be used merely as a competitive fuel, and without reference to any regulation.

At page 1173, Acting Chairman Geoger interrupted Mr. Wittmer's examination with the question:

> "Well then, why dig around here into all this stuff? If you couldn't sell the gas but for 10 cents an acre, you wouldn't take the best acreage in the state of Ohio as a gift; so that your estimate of your profit is what really controls what you think the acreage is worth.
>
> Mr. Turner: That wasn't what he said, your Honor.
>
> Q. (By Commissioner Geiger) Well, isn't that so? A. Substantially. We must keep in mind a lot of things in connection with natural gas as a competitive fuel. I said a moment ago, it is the finest fuel that has ever been produced, whether it is for industrial, manufacture or home use. In competition with other fuels I don't believe that there is any comparison at present market prices, and when

I put a price on leaseholds that have a probable recovery of 1,000,000 or 10,000,000 feet of gas per acre, it is on the theory that natural gas, without any serious competition, can always be marketed. When we were in the domestic business as a utility, and when we were supplying gas to industrials, the industrial business was always very much better than the domestic business. We wouldn't think of distributing gas to domestic, only we were a utility and were compelled to do it. We would have gone out of business very early if it hadn't been for the industrial business that kept us going. I don't believe that natural gas will ever go begging anywhere. They are transporting natural gas for a thousand miles into Chicago, and I don't know why you couldn't take natural gas from Ohio and transport it only one-third the distance for very much less money than what they are transporting it in from West Texas. The same thing is true about Detroit."

At page 1125, Mr. Dally testified:

"Q. Mr. Dally, taking into consideration no regulated prices of any kind for gas, taking into consideration no prices whatever for natural gas, I want you to give to this commission your opinion of the value of these gas lands, based only upon the value of the gas therein as a competitive fuel? A. I think the value of all the lands is a fair value between a willing buyer and a willing seller, even though they had no market or price.

Q. Well, what I am trying to get at is whether or not as a competitive fuel simply these lands are worth the prices that you have put upon them? A. I believe they are.

Q. (By Commissioner Bricker:) Would they be worth any more? A. They might be worth more, but that would be dependent on the further development of the lands, and possibly the rate would come

in there, or the market that you could sell the gas in."

(R., 1126.) "Q. Do you feel that regulation or fixed rates has in any way affected the value of these leasehold interests? A. Well, I can't answer that question to that fixing the value of them, whether rates are regulated or not, but they have a value outside of the regulation.

Q. Well, has regulation affected that value in any way? A. Well, you refer to the regulation of the—

Q. The fixing of rates either by municipalities or by this commission or other commissions, yes. A. Well, it has in a measure, yes, sir.

Q. In what way? A. It puts the property and the whole company's destiny up against the views of the commission or the regulation of whatever they may be, and limits their possibilities.

Q. And how is that reflected in the value which you placed upon this acreage? A. Well, my valuations were placed outside of that.

Q. You did not take into consideration the fixing of the price of gas to the public? A. No, sir.

Q. In arriving at your valuation? A. No, sir."

On recross examination at page 1258, Mr. Meals was asked:

"Q. And what would such willing buyer expect to do with such acreage? A. They would find a market for it.

Q. Find a market for it? A. Yes.

* * * * * * * * * * * * * *

Q. Where would such purchasers find a market for that gas outside of public utility in Ohio?

(After interchange by counsel.)

A. Outside of public utilities there would be quite a lot of industrial markets for gas, but on the way to some other market they could pick that up. I

think there are better markets at a higher price farther on."

(R., 1259.) "Q. There is no out of utility market for that consumption in Ohio, is there? A. They could use all of that amount of gas if the price were right in your Youngstown district.

Q. If the price were right? A. Yes, but you would have to compete with other fuels in that section. Now, as you go farther north you will find a higher price. For instance, our people at one of their plants are paying 60 cents for their industrial gas now."

At page 1263 Mr. Meals testified:

"Q. Mr. Davies asked you about markets and I want to have you assume that the gas found upon this property could be transported out of the state of Ohio. Is the property so located that it would be adapted to supply the city of Detroit, Michigan? A. It is.

Q. Is it so located that it would be adapted to supply the city of Pittsburgh? A. Yes, sir.

Q. Is it so located that it would be adapted to supply the city of Buffalo, N. Y.? A. It is.

Q. Is it so adapted that it could be supplied to any of the Atlantic seaboard north of Richmond, Virginia? A. Yes, sir; I think that in a short time it could be carried clear through over to the New Jersey coast.

Q. Do you know that the Columbia System now has a pipe line to the New Jersey coast, or approximately there? A. Approximately there, yes, sir.

* * * * * * * * * * * * *

Q. (By Commissioner Geiger:) Well, your answers to Mr. Turner's questions would seem to lead to the conclusion that to your mind the value of gas lands in Ohio, and consequently the value of gas itself, is dependent upon its proximity to a wide

market for domestic and industrial purposes in the eastern part of the United States? A. His questions may have assumed that, but it will be a very short time until the entire network of pipe lines practically from the Gulf of Mexico to the Lakes, practically from the East to the West, will be connected up so that gas can be carried possibly any direction.

Q. Well, now, to your mind the value of gas so linked up and carried would depend upon the bidding of the people who wished to consume the gas; if Philadelphia is ready to pay more for gas than Columbus Ohio, is, then the gas should be diverted to Philadelphia and sold there; if Pittsburgh would pay more than Cincinnati, Pittsburgh gets it, and if New York City will pay more than any of the others and is connected up, then it should have the gas at the price it is willing to pay? A. In making my calculations—

Q. (By Commissioner Geiger:) Well, is that your idea of the future fixing of the value of gas? A. I didn't make my valuation by fixing it that way. I based it on a value of the acreage, and figured it at the well, but with the view of someone coming in and carrying it through to a point where there was a market. Now, I do know of markets as high as 60 for industrial gas, which would not require the length of pipe line that is now in service in this country (company)."

At page 1284 Mr. Webber testified:

"Q. (By Commissioner Geiger:) You appreciate the difficulty that we are confronted with, at least apparently, and you estimate the value of the acreage by having some general knowledge of how much you could sell that gas for; we have got to say how much you can sell that gas for and turn around and find out how much his property is worth producing

gas. It is a circle there that we can't quite complete? A. I appreciate it, Judge, and I have had the same difficulty with bankers. You ask what gas is worth in the ground; I can't tell you. I have been asked that a great many times. I have had the same difficulty with some very good bankers. I can't fix a price; I don't know how you are going to fix a price of gas in the ground, but we can fix it from an acreage standpoint because we know it is sold for that. We know acres have sold at a much higher price than I have put in this, in small lots; and investors in 1929 were looking for these big ones. I would have been delighted to have had that as a $38,000,000 proposition. They wanted to look at things of five million or better. I have inquiries now for territories of good size, getting them ready for later offers."

(R., 1285.) "There is a wonderful market in the east for industrial gas, and domestic gas, but I have in mind industrial gas. I have seen some figures on the northeastern cities, Rochester, New York — I don't like to quote the figure of the amount of gas they would undoubtedly use there under competition with coal; I think more than this territory would supply, that one city. And there is no trouble to finance a pipe line if you can show them your gas and a market—wasn't in 1929, would be today."

(R., 1307.) "Q. What is the fact as to whether other gas companies own gas lands in this territory shown on the map Company Exhibit No. 139? A. Several other companies own territory in the same field.

Q. Assuming that the laws of this state did permit competition in the various cities of the state, do you know of any reason why the gas from these fields could not be sold in competition with any other natural gas? A. I do not.

Q. Assuming that the laws permit this gas from these fields to be exported from the state of Ohio,

do you know of any reason why that gas could not be sold in such markets as Detroit, Buffalo, Rochester, Erie, and other towns and cities? A. I know of no reason why it could not.

Q. You were asked what a willing buyer would do with a property after he got it and asked if he would not have to sell the gas; might he not sell the leaseholds? A. He might, yes, sir."

On cross examination Mr. Dally testified:

(R., 1118.) "Q. Did you give any consideration to the question of what difficulty there might be in getting from some of these fields to a market? A. Yes, I did. That is entirely surmountable anywhere in this state if you have the market. There are districts you can take this gas to and sell it for industrial purposes in times when things are different from what they are just now, but under normal conditions the distance from the fields would not be a serious matter."

At page 1249 Mr. Meals testified:

"Q. Mr. Meals, did you fix in the value that you have given here in this case those values on the leases or upon the gas content? A. On the leases."

At page 1306 Mr. Webber testified:

"Q. Did you put a value upon the gas content or upon the leases as leasehold rights?

The Witness: My value was given on the leasehold acreage."

At page 1128 Mr. Dally testified:

"Q. And in supplying gas you had to take into consideration what the gas was sold for? A. Yes, and buying it you have to do that. I think a man

could buy the property at these figures and sell gas at a competitive rate against other fuels; that is my opinion."

The lowest market value figure for the No. 1 leaseholds was $11,473,717. The court below held that the book value only of the No. 1 should be allowed, which as shown by City Exhibit 86, p. 3, is $1,569,479.88.

Substituting this lowest testified to value for the No. 1 leaseholds only on Sheets 2 of Exhibit "B" of the majority and minority of the commission would produce a gate price for the majority of 39.528 cents, and for the minority of 32.208 cents; and a retail rate for the majority on Sheet 1 of Exhibit "C" of 55.58 cents, and a retail rate for the minority on his Sheet 1 of Exhibit "C" of 48.48 cents. (R., 2220.)

Had the average market value for the No. 1 leaseholds only, to wit: $66.00, been used, the gate and retail rates for the majority and minority would be as follows: The majority's gate price would be 40.47 cents and its retail rate 56.57 cents; while the minority's gate price would be 33.1518 cents and his retail rate would become 49.47 cents. (R., 179; 217.)

Had the average market price for both the No. 1 and the reserve acreage been used it would have increased the majority's gate price to 43.35 cents, while the majority's retail rate would have become 59.599 cents. The minority's gate price would have been increased to 36.033 cents, while the minority's retail rate would have become 52.50 cents.

Had the lowest market value testified to in the case for both No. 1 and the reserve been used, the majority's gate price would have become 41.38 cents and its retail rate 57.53 cents. The minority's gate price would have been increased to 34.06 cents, while the minority's retail rate would have become 50.428 cents.

B (2) GAS RESERVES.

The court below refused to allow any value of any kind for any reserve gas acreage whatever. Except the decisions by the court below in the instant case and in the case of **Logan Gas Co. v. Public Utilities Commission,** 121 Ohio St., 507, we know of no case in the country where a natural gas company has been denied the right to a valuation on a reasonable amount of reserve gas acreage. In all the natural gas cases reviewed by this court the value of the natural gas company's reserve acreage has been included in the rate base.

When the cases of **United Fuel Gas Co. v. Railroad Commission**, 278 U. S., 300, and **United Fuel Gas Co. v. Public Service Commission of West Virginia,** 278 U. S., 322, were pending in the lower Federal Courts questions as to the propriety of including any valuation of reserve acreage in the rate base were raised.

In the first mentioned case, Judge Hickenlooper said, (13 Fed. [2d], 510):

> "We think that it must be conceded that the company has a right to hold as used and useful in its business reserve or undeveloped gas acreage in which

to prospect for gas. Much of this may prove unprofitable, but it is necessary for a continuance of the life of the business."

In the second case, the three-judge court allowed gas territory containing an estimated amount of gas "sufficient to meet the needs of its public service patrons alone for almost a quarter of a century." (14 Fed. [2d], 221.)

The commission in the instant case found that the gas acreage or No. 1 leaseholds upon which only it had allowed any valuation were sufficient only for the period of three years and two months from the date certain, and depreciated all gas wells accordingly. (R., 161.)

The court below approved the gas well depreciation based upon the three years and two months of probable life of the No. 1 leaseholds.

As was said by Judge Jones in his dissenting opinion below (R., 74):

> "The theory advanced that a tract held in reserve may be capitalized only if and when it is being actually operated is obviously unsound. It might as well be argued that a set of steam boilers, held in reserve for unforeseen contingencies but not presently operated, should not be valued until they were being put into actual use. The utility's gas territory is its chief and necessary asset; its extent being measured by the requirement of all the communities which it is called upon to serve and the reasonable cost of service should be allocated among them. * * * That situation, which is now so evident, did not so clearly appear when we decided the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507."

While there is no criticism in the instant case of the amount of reserve acreage carried, the language of the finding of the court in the case of **Wichita Gas Co. v. Public Service Commission,** 2 Fed. Supp., 792-808, is not inapplicable here:

> "Who shall determine what reserves are adequate? A commission, with no moneys invested, or the owners of this pipe line which, without gas, is worse than useless? Within the limits of reason, undoubtedly that determination must be left with the owners. Perhaps they have been over cautious, but if error is to be made, it should be on the side of ample reserves. The owners of this property had seen the gas exhausted from field after field; they had seen their customers lost because the supply had failed; they had seen fields of great promise belie their expectations. They had seen geologists wrong before."

In Company Exhibit 57, pages 8 and 9, will be found a long list of Ohio companies which lacked the reserve acreage necessary to continue in the business. (R., 1052.)

Every witness who testified on the subject said that without these reserves The Ohio Fuel Gas Company could not be established and could not be successfully operated. Under the heading of "Delay Rentals", supra, A (3), we have set out some of the testimony of those witnesses.

We asked the city's witness Blundon (R., 1416):

> "Q. Are you competent to answer the question as to whether The Ohio Fuel Gas Company needs any reserves other than its No. 1 leaseholds to discharge its obligation to customers in the state of Ohio? A.

I am not competent to answer that question at this time.

Q. Well, you were not competent when you made the allocation, were you, that is, to answer that question? A. No, sir."

In the industry the acreage or leaseholds, is classified as "Operated" and "Unoperated". Any leasehold on which there is a well is considered "Operated". For convenience in valuation, both the operated and the unoperated acreage was classified into Nos. 1, 2, 3 and 4. While the company carries on its books 347,306 acres of "Operated" leaseholds (City Ex. 26) (R., 3019), only 291,396 acres were classified as No. 1, and the book value only of this Class No. 1 was allowed.

The classes are defined as follows:

Class 1. Leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public.

Class 2. Leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon.

Class 3. Leases of tracts of land shown by surrounding or neighboring developments or operations, geological considerations, etc., to be reasonably certain to be good gas lands, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling.

Class 4. Leases of tracts of land situate within the areas of territory where gas sands are known or assumed

to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands.

The witness Roth, geologist, testified that between June 30, 1929, the date certain of the leasehold valuation, and May 31, 1931, at the time of the hearing, 287 wells had been drilled in No. 2 territory, 130 in No. 3 territory and 170 in No. 4 territory; that the aforesaid drillings were in 28 different counties, and that in 19 counties actual production was obtained from No. 4 territory. Of all the wells drilled by the company during said period 14.3% were in No. 1 terrtiory, 49.9% in No. 2, 19% in No. 3 and 24.8% in No. 4 territory. (R., 1319-1320.)

The amount of the reserve acreage and the market value thereof is summarized on page 19 of Company Exhibit 44 (R., 2910), and is as follows:

	Number of Acres	Total Value	Average Value Per Acre
A. B. Dally, Jr.			
Class No. 2....	164,739	$16,473,900	$100.00
Class No. 3....	312,631	6,252,620	20.00
Class No. 4....	2,065,421	4,130,842	2.00
George Wittmer, Jr.			
Class No. 2....	164,739	$12,300,000	$74.66
Class No. 3....	312,631	3,120,000	9.98
Class No. 4....	2,065,421	6,195,000	3.00
S. W. Meals			
Class No. 2....	164,739	$9,884,340	$60.00

		Going Concern Value.	
Class No. 3....	312,631	1,250,524	4.00
Class No. 4....	2,065,421	8,261,684	4.00
D. S. Webber			
Class No. 2....	164,739	$10,440,300	$63.37
Class No. 3....	312,631	10,504,320	33.60
Class No. 4....	2,065,421	6,196,263	3.00

The valuation witnesses testified that the value which they had put upon the above acreage was based upon the price which a willing purchaser would pay to a willing seller, and that the gas under the leaseholds could be sold in unregulated markets in competition with other fuels. (See evidence quoted under "Market Value of Leaseholds", B (1), P. 93.)

B (3) GOING CONCERN VALUE.

The properties involved here have a going concern value. They are "assembled and established plants doing business and earning money." This value is a property right upon which the owners have a "right to make a fair return."

Des Moines Gas Co. v. Des Moines, 238 U. S., 153.

In an article by Henry E. Riggs, in **Public Utilities Fortnightly** for December 21, 1933, p. 763, after examining the approximately two hundred recorded cases before courts and commissions involving going concern allowances, it is said: (p. 770)

> "The percentage figures derived from these allowances range from a minimum of about 3 per cent. to a maximum of 30 per cent., averaging on all of the recorded cases approximately 10 per cent."

Going Concern Value

No going concern value was allowed by either the majority or minority commission. In respect of The Columbus Gas and Fuel Company the engineers for both the appellant and the city of Columbus testified definitely that no going concern value was included in their valuations of the physical plant. (R. 2775; 2786; 2720-21; 3419.) They testified specifically that going concern value was not included in their allowance for general overheads. That none was included in the general overheads by the commission, is shown by the fact that while the engineers for both the city and appellant said general overheads should be allowed at the rate of 15% of the material and labor costs, the commission (majority and minority) reduced this allowance to 12½%, and specified the item of cost or value covered thereby. (R. 209; 198.) Going concern value was not included.

In respect of The Ohio Fuel Gas Company, Mr. Lerch of Ford, Bacon and Davis, engineers for appellant, stated that going concern value was not included in the valuation of the physical property, but had been separately considered and valued. (R. 1729.) Mr. Blundon, for the city of Columbus, made no valuation. He merely adjusted the Ford, Bacon and Davis valuation by reducing certain items and eliminating others. Among the items he eliminated was going concern value. (R. 1938.) Among the items reduced was general overheads, which he reduced to 14% and that was the figure used by both the majority and minority commission. (R. 165; 198.)

In respect of United Fuel Gas Company, both the ma-

jority commission and the minority commissioner used as a basis of value the findings of the West Virginia commission as set out in Co. Ex. 78 (R. 2950), with certain definite reductions and eliminations. Among the reductions was general overheads which they reduced to 14%, and among the eleiminations was going concern value which had been separately valued by the West Virginia commission.

In order that there might be no confusion about this question, the majority commission made the issue clear cut by saying: (R. 171).

"Going concern value has been disallowed."

The court below however, in the face of the foregoing, again took refuge in the statement used since the decision in the Des Moines case, **supra**, by commissions and courts unfavorable to the allowance of going concern value, by saying: (R. 63).

> "The members of the commission were unanimous in the disallowance of going concern value **as a separate item.**"

This is not such a case. When going concern value was disallowed here "as a separate item" it was disallowed entirely.

The existence and the amounts of the going concern values of the several properties involved in this case were established by evidence. In respect of The Columbus Gas and Fuel Company, Dr. Dewing (R., 2574), and Mr. Hamilton (R., 2614), supported it from the

standpoint of men experienced in the purchase, sale and operation of gas companies. Mr. Wheeler of Ford, Bacon and Davis (R., 2560), supported it by extended and detailed studies of the history of appellant and other companies in Ohio. Their testimony fully sustained the claim of appellant for going concern value in the sum of $537,340.00 as shown on Co. Ex. 2, p. 12 (R., 2874.)

In respect of The Ohio Fuel Gas Company the going concern value was proved by the testimony of Mr. Lerch, an engineer experienced in the valuation of utility properties (R., 1716, et seq.), and of Mr. Wheeler who also made an extended and detailed study of the company, and whose conclusions are found in Company Exhibit 57, filed here as an original exhibit, and testified to at R., 1663. The value of $12,000,000.00 set up by Ford, Bacon and Davis in Company Exhibit 45, page 3 (R., 2914), was sustained.

In respect of United Fuel Gas Company the West Virginia commission had separately valued the going concern value at $3,171,193.00. (Co. Ex. 78, p. 15. R., 2960.) The witnesses for the protesting cities had testified to a going concern value of $4,500,000.00. (Co. Ex. 78, p. 10, R., 2956.) It is true that the Supreme Court of Appeals of West Virginia had suggested further study of this question, (City Ex. 30, R., 3028), and that the West Virginia commission in determining whether its temporary rate should be continued in force disregarded going concern value for that purpose. (City Ex. 76.)

Just as this court in **McCardle et al. v. Indianapolis Water Company,** 272 U. S., 400, was able to ascertain from the record that although general overheads had been included in the value of the property, going concern value had not been given proper consideration, so in this case this court will see from the record that no going concern value has been allowed.

Also, as in the McCardle case, this court will find from this record that:

> "The evidence is more than sufficient to sustain 9.5 per cent for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that ten per cent of the value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account."
>
> **272 U. S., 415.**

The court below mistakenly relies upon the case of **Los Angeles Gas & Electric Corporation v. Railroad Commission,** 289 U. S., 287, as supporting its disallowance of going concern value. (R., 64.) In that case as in the case at bar the commission had not allowed any going concern value. (289 U. S., 297.) The court below had also refused to allow anything for going concern value. (289 U. S., 303.) Mr. Chief Justice Hughes, speaking for the court, after reviewing former decisions, said at page 314 of the opinion:

> "The concept of going value is not to be used to escape the just exercise of the regulatory power in

fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones."

The case was not reversed on this ground because this court found upon an analysis of the findings that there was more than $5,500,000.00 of value allowed which could be attributed to going concern value. When this court considers the extremes to which the commission and the court below had to go in the case at bar, in order to sustain the low rates allowed, it will be apparent that no such surplus exists here.

The effect of the refusal of the Ohio commission and the court to consider or allow any going concern value in this case is shown by the following:

The value of the property of United Fuel Gas Company allocated to the sale and delivery of gas at the Ohio river to The Ohio Fuel Gas Company would have been $14,427,890. (R., 178.) The return at 6½% would have been $937,812; the "total expenses and return" $3,470,-260; and the rate 22.40¢ per M c. f. instead of the 22.04¢ as computed by the majority commission.

Applying this rate to the item "Purchased gas from United Fuel Gas Company (Sheet 1, Ex. B., R., 179), the amount is $385,356; and the "Total expenses and return" of the Ohio Fuel Gas Company applicable to The Columbus Gas and Fuel Company would be $2,329,841.

If the going concern value claimed by appellant and established by the evidence, to wit, $12,000,000 be added to the value of the property of The Ohio Fuel Gas Com-

pany, the property applicable to The Columbus Gas and Fuel Company would be $9,618,487. (R., 179.) The "Return @ 6½% would be $625,201 instead of $538,507. Adding this difference of $86,694 to the $2,329,841 above, makes the "Total expenses and return" $2,416,535, and the gate price 40.57¢ per M c. f. instead of 39.02¢.

Applying this gate price to the purchased gas of The Columbus Gas and Fuel Company, makes that item $2,416,535 (R., 182), an increase of $92,687 in the costs of that company.

If the going concern value of $537,340 be added to the value of the property of The Columbus Gas and Fuel Company, as fixed by the majority commission and the minority commissioner the "Total property used and useful" becomes $4,564,987 (R., 182; 220), and the return @ 6½% is $296,724, an increase of $34,927. Giving effect to these two increases makes the "Total expenses and return" of The Columbus Gas and Fuel Company $3,249,826, and the retail rate 57.29¢ per M c. f. instead of the 55¢ allowed by the majority commission.

The minority commissioner's river price was 17.79¢. His valuation of the property of United Fuel Gas Company was the same as that of the majority commission. Due to his elimination of lease rentals and reduction of depreciation—Amortization allowance, his "Total expenses and return" applicable to The Ohio Fuel Gas Company purchases was $2,955;472. If the return be increased by adding the above going concern value to his rate base, his "Total expenses and return" becomes $2,822,100 and his river price 18.27¢.

Applying this river price to his allowance on Sheet 1, Ex. B., (R., 217) for "Purchased gas from United Fuel Gas Company" the cost of that gas to The Ohio Fuel Gas Company is $314,288, an increase of $8,078, making the "Total expenses and return" $1,895,933.

If the going concern value of $12,000,000 be added to the minority commissioner's valuation, the value of the property of The Ohio Fuel Gas Company applicable to The Columbus Gas and Fuel Company becomes $9,394,637. The "Return @ 6½%" is then $610,651, an increase of $86,694. Giving effect to these two increases makes the minority commissioner's "Total expenses and return" applicable to The Columbus Gas and Fuel Company $1,982,627 and his gate price 33.29¢ per M c. f. instead of 31.7¢.

Applying this gate price to the purchased gas of The Columbus Gas and Fuel Company makes that item $1,982,493, (R., 220), an increase of $94,688 in the costs of that company.

If the going concern value of $537,340 be added to the value of the property of The Columbus Gas and Fuel Company, the "Total property used and useful" (Sheet 1, Ex. C., R., 220), becomes $4,564,987, and the return @ 6½% is $296,724, an increase of $34,927. Giving effect to these two increases makes the minority commissioner's "Total expenses and return" $2,849,174, and his retail rate 50.23¢ per M c. f. instead of 47.95¢.

If going concern value be restored to the valuation, the 6½% allowed to United Fuel Gas Company is only

6.1%. If going concern value be then added to the majority commission's value of the property of The Ohio Fuel Gas Company and that company pays a river price sufficient to provide a 6½% return to United Fuel Gas Company, the 6½% return allowed by the majority commission to The Ohio Fuel Gas Company is only 5.53%. If going concern value be in turn added to the value of the property of The Columbus Gas and Fuel Company found by both the majority and minority commissions, and that company pays a gate price sufficient to provide a 6½% return to the producing companies, the 6½% return allowed to The Columbus Gas and Fuel Company is only 3.7%.

Adding going concern value to the property of United Fuel Gas Company makes the 6½% allowed to that company by the minority commissioner only 6.1%. Adding going concern value to the minority commissioner's value of the property of The Ohio Fuel Gas Company, and allowing a river price sufficient to provide a 6½% return to United Fuel Gas Company, reduces the 6½% allowed by the minority commissioner to The Ohio Fuel Gas Company to only 5.51%. Adding going concern value to the value of the property of The Columbus Gas & Fuel Company, and allowing a gate price sufficient to provide a 6½% return to the producing companies, makes the return to The Columbus Gas and Fuel Company under the minority commissioner's findings only 3.7%.

B (4) PRESENT VALUE OF GAS WELLS.

In **McCardle v. Indianapolis Water Co.**, 272 U. S., 400, Mr. Justice Butler said, at page 416:

> "The testimony of competent valuation engineers, who examine the property and make estimates in respect of its condition, is to be preferred to [illegible] calculations based on averages and assumed probabilities. (Citing cases)."

In **Pacific Gas & Electric Co. v. San Francisco**, 265 U. S., 403, Mr. Justice McReynolds said, at page 406:

> "Appellant objects to the application of this method, and insists that depreciation should have been ascertained upon full consideration of the definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions, and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation, for the definite purpose of ascertaining existing facts, we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities."

The reproduction cost of the gas wells (Accounts 211 and 212) was found without regard to the gas content of the leaseholds underlying the wells.

Instead of following the method pursued in ascertaining the present value of the other property, the commission attempted to measure the depreciation of gas well construction and equipment by estimating the remaining gas content of the field rather than by an observation of

the gas well construction and equipment. No attention whatever was given to the open flow of the well. Two wells in given location might have the same rock pressure, but the amount of gas recoverable under one well might readily be much greater than the amount recoverable from the other. This resulted in a deduction of $10,387,311 below the cost of reproduction less observed depreciation.

The valuation of the gas wells had been made by Ford, Bacon & Davis, Inc., a nationally known appraisal firm. At page 17 of Company Exhibit 45 (R., 1530), Ford, Bacon & Davis explain their method of ascertaining depreciation in the well accounts as follows:

> "The percentage deduction for deterioration in gas wells has been based upon a study of all the conditions which contribute to deterioration of this class of property and the extent to which this deterioration has taken place. This study included an investigation of the history and cost of upkeep of wells by classes predicated upon the well being completely cased or not. It also included an observation of the condition of all casing and tubing recovered from abandoned and repaired wells now in the possession of the company, due allowance being made for the fact that abandoned casing and tubing can only supply a basis for estimating the condition of property at time of abandonment and not as of its condition in use prior to its abandonment."

At page 1530 of the Record, Mr. F. H. Lerch, of the Ford, Bacon & Davis organization, testified upon cross-examination as follows:

> "A. The method is based upon a consideration of the wells as items of physical equipment and to de-

termine the depreciation from all of the facts which we can gather concerning the condition of the wells as items of physical equipment, and from those facts to determine a percentage which is fair and reasonable in our judgment.

Q. Which, translated, means what? A. It means that we are endeavoring to place an observed condition upon the wells."

At page 1533, Mr. Lerch testified further on cross-examination:

"We were discussing the other day the thought that you had used one method for depreciating the wells down in West Virginia and one for depreciating them in Ohio; is that true? A. Yes, sir; that is true; that is true.

Q. Which is the better method? A. I think the method of considering them items of physical equipment and arriving at some deteriorated basis based upon the closest approximation to observation is the best method."

At page 1624 of the Record, Mr. Thomas R. Weymouth, one of the leading gas engineers and practical operators of the country, testified:

"A. First of all, I would like to explain what I mean by depreciation, to avoid the confusion which usually attends a discussion of that subject. I understand the term or shall use the term to express the condition of the equipment at the particular time spoken of; that is, it has nothing to do whatsoever with accounting depreciation, or amortization or annual charges from revenue to depreciation accounts, but simply is used to express the condition and the present value of the property in question."

Beginning at the middle of R. 1627, Mr. Weymouth testified:

"The value of that hole is not in any sense related to the extent of the gas reserves in the ground. A hole costing a certain amount of money is, for the purposes of establishing a rate, valued at the present cost of drilling the hole. The value of that hole costing a fixed amount of money would be the same if there were twenty million cubic feet of gas per acre under the well in question or if there were five million cubic feet of gas per acre under the well. So that the value of the hole does not depend upon the reserve. The value of the hole does not depend upon the rate at which the well will permit the flow of gas to the lines. A hole costing a fixed amount of money will be just as valuable in a well flowing one million cubic feet per day as it is in a well flowing twenty million cubic feet per day, and it doesn't change as that rate of flow changes.

Neither is the value of that hole dependent upon the rock pressure in the well. If the rock pressure is high in the beginning in one well and lower in another well, if the two wells cost the same amount of money, they will have the same value for rate purposes. If one well exhibits a greater decline of rock pressure than the other well, the value of the hole does not change by that. In other words, the only thing that could change the value of that hole is a change in its condition, either its physical condition or its functional condition, and as long as it is ascertained that neither of those conditions has changed, the value of the well has not changed.

Q. Then what you have said in respect of well construction applies equally to gas well equipment? A. It does. The condition of the equipment determines the amount of depreciation sustained, just as the condition of the well hole determines the amount of depreciation sustained in it.

Q. I wish, if you could, at that point, illustrate by two wells of similar cost put in at about the same time, one having a large initial flow, the other a smaller initial flow (p. 1628), one a high rock pressure, and the other a low rock pressure? A. If we take that as an illustration, two wells might be assumed to cost a fixed amount, let us say, $10,000 each, one of them in a field which will show a rock pressure of a thousand pounds, and have an open flow of a million cubic feet of gas per day, the other one having a rock pressure of 500 pounds and an open flow capacity of 500,000 cubic feet of gas per day; those wells will both be valued at their cost of construction, namely, $10,000 each.

Q. Is there any justification, in your opinion, for making the present value of one of them much less on account of the rock pressure? A. No, there is not. To continue the illustration, if the thousand pound well having a million feet open flow should be drawn upon until its rock pressure has declined to 500 pounds and its open flow 500,000, which is the condition assumed for the comparative well, the value of the high pressure well would not have declined 50 per cent but would remain the same and be the same as the other well.

Q. Let me ask you to comment upon the wells shown in Company Exhibit 183, and particularly at this time 4009 and 4252 in connection with my previous question? A. These two wells, 4009 and 4252, shown in Exhibit 183, are adjacent wells, drilled at what is called one location apart. The initial rock pressure of 4009 was in the neighborhood of 1120 pounds. The sheet attached to the exhibit shows that the pressure of that well had actually declined to 295 pounds in 1926. The pressure of well 4252 had declined to 223 pounds in the same year. Now, if these wells be taken at that point as the starting point and their condition at that time taken as the base, that is, their cost, it would appear that they

are of the same value because their rock pressure is approximately the same and I believe the flow is about the same, although that isn't shown on the chart. Well 4009, if it cost just as much or if its value referred to present day prices, is just as much as well 4252, would have the same value in 1926 as well 4252 and would continue to have that same value until the time when it was necessary to abandon it, even though well 4009 is about five years older than well 4252, and has produced more gas."

As will be seen at page 29 of Company Exhibit 45 (R., 2912), the cost of reproduction without overheads of account 211—gas well construction is $14,192,077, while the present value or cost of reproduction new less depreciation is $11,353,662; and the cost of reproduction of account 212—gas well equipment is $9,715,175, while the present value or cost of reproduction new less depreciation is $7,772,140. The overhead allowance by both majority and minority of the commission is 14%.

The city introduced as an expert witness—and the commission permitted him to testify—a young man by the name of Blundon who had never had any experience of any kind in the natural gas business. His claim of expertness was based upon an engineering education and the fact that he had testified as an expert before the Public Service Commission of West Virginia on behalf of one of the cities in a case involving the property of United Fuel Gas Company. (R., 495; 497.)

In the United Fuel Gas Company case, Ford, Bacon & Davis, Inc., were also engaged. In an earlier case in West Virginia, Ford, Bacon & Davis, Inc. had valued gas

lands and gas wells as a single unit. In other words, they valued the gas field with the wells in the field and arrived at present value by measuring the depletion of gas in the field.

In the present United Fuel case here involved, they had valued the accounts of gas well construction and gas well equipment by the cost of reproduction method. In arriving at the present value for gas well construction they used the depletion method, but in arriving at the valuation of the gas well equipment they arrived at the present value by deducting observed depreciation.

In making a valuation of the Ohio Fuel gas properties, Mr. T. R. Weymouth, on behalf of the company, pointed out to the Ford, Bacon & Davis organization that in a cost of reproduction valuation such as is required under Section 499-9 of the General Code of Ohio, the observed depreciation method should be used in arriving at the present value not only of the gas well equipment account but of the gas well construction account. (R., 1630.)

Young Mr. Blundon made no valuation of any kind. What he did was simply to take the Ford, Bacon & Davis cost of reproduction new of gas well construction—Account 211, and gas well equipment—Account 212, and apply thereto a depreciation factor which he arrived at in the following manner, without making any examination of the respective wells: taking the 217 wells in the eastern field, he ascertained both the original well rock pressures and the well rock pressures as of the date of valuation for each well and computed the percentage

which his figures for the present rock pressures bore to his figures for the original rock pressures of all the wells in the field. He arrived at a composite figure of 57.77% for said 217 wells. He made similar calculations for the 487 wells in the Lancaster district, the 443 wells in the Mt. Vernon district, the 1677 wells in the Northern district, the 515 wells in the Southern district, and the 323 wells in the Stewart district. (City Ex. 74, p. 9.) From the foregoing he then computed an average figure for all of the wells of all of the districts. But at no time did he have any figures which showed either the original or the present gas content of the respective fields. By this merely clerical and clearly erroneous operation he obtained a factor of 58.1138%, and used this factor to depreciate the entire cost of reproducing the 3662 wells. In other words, he applied his depreciation factor—not to the wells themselves, but to the lump sum of the reproduction cost of all the wells, i. e., Accounts 211—gas well construction, and 212—gas well equipment.

Blundon gave no consideration to the original rock pressure of the pools. His original rock pressures were the rock pressures of individual wells which came in at different dates, in different fields, and under different conditions.

Under the method pursued by Mr. Blundon there is no possibility of determining the present gas content of the field or the relation of the present to the original gas content. We mean by this to say that Mr. Blundon's de-

preciation factor of 58.1138% is not representative of any existing fact.

A perusal of Mr. Blundon's cross-examination should convince any one even without a knowledge of geology that Mr. Blundon did not understand what he was attempting to do. But even if Mr. Blundon had properly arrived at the depletion of the gas fields, it is our contention that such depletion method could not be used for depreciating the original value of the gas well construction and gas well equipment which had been fixed without reference to the gas content of the field.

Mr. Blundon's justification for adopting this method as applied to both gas well construction and gas well equipment of the Ohio property was that the public service commission of West Virginia had applied it to the United Fuel Gas Company's wells.

While the instant case was pending before the Ohio commission, the Supreme Court of Appeals of West Virginia, in the case of **City of Charleston, et al. v. Public Service Commission,** 110 W. Va., 245—handed down an opinion reviewing the valuation of the United Fuel Gas Company's property in the hertofore mentioned proceeding, and said: (R. 3031).

> "It was stated in argument by counsel for the utility that the cost of well equipment was fixed at 46% of the original cost, no matter whether the wells were new or old. We suggest that the commission review again the evidence as to the wells; and unless there is a sufficient number of old wells to offset the new wells, then the value of the equipment be adjusted in some more uniform manner."

The following is a hypothetical example showing the results of applying Mr. Blundon's method of depreciation to gas wells:

		Rock Pressure	Well and Equipment Per Cent. Condition
Well No. 1,	October 1, 1920, Initial rock pressure..	800 lbs.	100.00
	October 1, 1922, Rock pressure.....	500 lbs.	62.50
	October 1, 1924, Rock pressure.....	400 lbs.	50.00
	October 1, 1928, Rock pressure.....	300 lbs.	37.50
Well No. 2,	October 1, 1921, Initial rock pressure..	600 lbs.	100.00
	October 1, 1922, Rock pressure.....	500 lbs.	83.33
	October 1, 1924, Rock pressure.....	400 lbs.	66.66
	October 1, 1928, Rock pressure.....	300 lbs.	50.00
Well No. 3,	October 1, 1925, Initial rock pressure..	400 lbs.	100.00
	October 1, 1928, Rock pressure.....	300 lbs.	75.00

It should be noted that the condition of the well and equipment for the individual wells and the amount of depreciation sustained to the same dates (under the application of the pressure decline theory of depreciation) is entirely out of proportion. The following table will serve as illustration:

	Well and Equipment, Per Cent. Condition	Rock Pressure	Total Depreciation Sustained to Date	Average Rate Depreciation Per Year	Age of Well, Years
Well No. 1, October 1, 1920....	100.00	800 lbs.	0	0	0
Well No. 2, October 1, 1921....	100.00	600 lbs.	0	0	0
Well No. 3, October 1, 1925....	100.00	300 lbs.	0	0	0
Well No. 1, October 1, 1922.....	62.50	500 lbs.	37.50	18.75	2
Well No. 2, October 1, 1922....	83.33	500 lbs.	16.67	16.67	1
Well No. 1, October 1, 1924.....	50.00	400 lbs.	50.00	12.50	4
Well No. 2, October 1, 1924....	66.66	400 lbs.	33.33	8.33	3
Well No. 1, October 1, 1928....	37.50	300 lbs.	62.50	7.81	8
Well No. 2, October 1, 1928....	50.00	300 lbs.	50.00	7.14	7
Well No. 3, October 1, 1928....	75.00	300 lbs.	25.00	8.33	3

Attention is directed to the fact that on October 1, 1928, for well No. 1, which is 8 years old, the depreciation sustained is 62.50 per cent, while on the same date, for well No. 3, which is but 3 years old, the depreciation sustained is but 25 per cent. Yet both wells were completed on the same lease and are producing from the same stratum in which the reservoir pressure throughout the area is assumed to be the same. From now on with similar use each of these wells will produce the same amount of gas and have the same remaining life.

The Ohio commission applied Mr. Blundon's depreciation factor to the lump sums of both the gas well construction and gas well equipment accounts, as shown on sheet 2 of Exhibit "B" of the commission's findings. Through this estimate of gas depletion method the gas well construction and equipment, which both the minority and majority of the commission found, as shown by sheet 2 of their respective Exhibits "B" (R., 180; 217), to have a cost of reproduction new valuation of $23,907,252.00, was reduced to a value for the rate-making purposes of the instant case of $10,014,126—being $10,387,311 (with 14% overheads) less than the cost of reproduction new less observed depreciation according to the only evidence in the case of observed depreciation.

There is not a single word of challenge to be found in the record to the 80 per cent average present condition estimate of Ford, Bacon & Davis. On the other hand, there is ample corroboration of the Ford, Bacon & Davis estimate of 80 per cent average condition in the opinions

of both the majority and minority of the commission recognizing efficient management and operation, which would not be possible were any part of the physical property in less than a 50 per cent condition, especially the wells.

The problem of determining existing depreciation in gas wells and equipment is no different from that of determining the existing depreciation in the transmission lines. The hole in the ground and the tubing, casing and other equipment in and at the well constitute just another section of the pipe line in the trench which conducts gas from the well to the purchaser. Well gathering lines, being account 213—field line construction, and account 214—field line equipment, are especially in no different category from the wells. They are abandoned at the same time that the wells are abandoned.

Under the depletion theory adopted by the commission, if this property were to be reproduced by the drilling of brand new wells in the present producing fields, the commission would be compelled to allow the company the actual cost of constructing these new wells under its depletion theory, because the initial pressure of the wells, even though the fields be partly depleted, would govern.

For illustration: If the company's gas fields were to be reproduced, i. e., if we had a gas acreage under which there was gas in such quantities and with such porosity of sand that if 3662 wells were drilled therein the composite rock pressure realized would be 400 pounds, the cost of drilling and equipping these wells, according to the undisputed evidence in this case, would be $27,254,267. If 3662 wells were drilled in an acreage with quanti-

ties and porosity which would develop a composite rock pressure of 800 pounds, the reproduction cost new would still be $27,254,267. Regardless of the difference in rock pressure of the wells the reproduction cost is the same.

Another illustration will demonstrate the inaccuracy and inconsistency of the theory adopted by the commission. Under the commission's theory, a well which would cost, say, $10,000 to reproduce and which originally came in with a rock pressure of 800 pounds would today be valued at $5000 if the present rock pressure were found to be only 400 pounds. A well costing $10,000 to reproduce, drilled in the same pool today, and which would come in with a rock pressure of 400 pounds, would be valued at $10,000, or twice as much as the older well, although under the commission's theory both wells would from today on produce the same amount of gas for the same period and at the same rock pressure. Such a situation is not mere theory.

At page 495 of the Record, the city's expert, young Mr. Blundon, was asked:

"Q. All right. I understand you don't claim to be a geologist, do you? A. I don't claim to be an expert geologist, no, sir. I have studied some geology and have done work, engineering work in connection with geology.

Q. Did you ever do any work of any kind for a gas company, either a producing or distributing company? A. Not for a gas company, no, sir.

Q. Did you ever do any designing of any kind for a gas company or any engineering work of any kind? A. Not for a gas company, no, sir.

Q. Well, what I am trying to get at here is whether or not you have ever had the responsibility of either building any part of a gas utility or of operating

any part of a gas utility. A. Read that question again, will you please?

(Question read.) A. No, sir." (R. 496.)

Had the Gas Well Construction Account—211; and the Gas Well Equipment Account—212, been valued in the same manner that the other physical property was valued, then the valuation item "Production System" on Sheet 1 of Exhibit "B" (R., 179) attached to the majority's findings would have been $22,252,431, and the item "Total Property Used and Useful" would have been $84,925,591 on which the return should have been calculated. The item "Return @ 6½%" would have been increased to $5,520,163. The item "Total Expenses and Return" would have been increased to $21,583,017, which divided by the amount of the Ohio Fuel sales shown on the same page—53,570,575 M c. f.—would have produced a Columbus gate price of 40.28 cents.

Using this gate price on Sheet 1 of Exhibit "C" attached to the majority's findings (R., 182), would have changed the item under **Expenses and Return on Investment** "Purchased Gas from The Ohio Fuel Gas Company" at 40.28 cents per M c. f. (5,955,221) to $2,398,763. This would have increased the "Total Expenses and Return" on this last mentioned sheet to $3,197,127. Dividing this last mentioned total by the sales in Columbus shown on the same sheet to be 5,671,639 M c. f. would give a Columbus retail rate of 56.72 cents instead of 55 cents as allowed by the commission.

Applying the foregoing procedure to the minority's Sheet 1 of Exhibit "B" (R., 216), the result would not show so wide a change because the minority allowed nothing for depletion. However, the minority's item "Total Property Used and Useful" would become $82,911,598. The item "Return @ 6½" would become $5,38[illegible]254. While the item "Depreciation and Amortization" would become $1,993,399; and the item "Total Expenses and Return" would become $17,888,141. Dividing this last total by the Ohio Fuel sales—53,579,575 M c. f.—would have produced a gate price of 33.386 cents.

Applying this gate price to Sheet 1 of the minority's Exhibit "C" (R., 220) would change the item "Purchased Gas from The Ohio Fuel Gas Company" at 33.386 cents per M c. f. (5,955,221) to $1,988,210, which in turn would increase the item "Total Expenses and Return" to $2,819,964. Dividing this last total by the Columbus sales—5,671,639 M c. f.—produces a Columbus retail rate of 49.72 cents instead of 47.95 cents as found by the minority commissioner.

It is respectfully submitted that this method of valuation has deprived appellant of property equal to the value of a reasonable return on at least $10,387,311 without due process of law.

B (5) WORK IN PROGRESS.

As of the date certain the company had $234,295 invested in incomplete construction, principally uncompleted gas wells. (R., 1765.) This was omitted from the rate base by both the majority commission and minority commissioner. It was not even considered as an item of working capital, materials and supplies.

B (6) COST OF ORGANIZATION.

No allowance was made by either the majority commission or the minority commissioner for cost of organization. Ford, Bacon & Davis, Inc., placed the amount at $1,999,922. (R., 1656.) There was no testimony to the contrary. The witness, Blundon, for the city just left it out, and the commission did likewise.

In **Ohio Utilities Co. v. Public Utilities Commission,** 267 U. S., 359, this court in reversing the Supreme Court of Ohio, said at p. 362:

> "Reproduction value, however, is not a matter of outlay but of estimate and should include an allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility."

B (7) COST OF FINANCING.

No allowance was made by either the majority or minority commissions for cost of financing. The only testimony as to the amount of this cost was that of Ford, Bacon & Davis, Inc., who placed it at $3,199,876. (R., 1659.) The testimony shows that this expense would be necessarily incurred. (R., 1659; 2733; 2735; 2754; 2758.)

B (8) OVERHEADS.

While the majority commission approved the material and labor costs of Ford, Bacon & Davis, Inc., they reduced the general overheads to 14% on the testimony of Mr. Blundon, a man of very limited experience. The minority commissioner reduced the general overheads to 14% and also made other reductions in the value. $1,055,496 was thus taken off of the valuation of the majority commission, and $1,038,757 from the valuation of the minority commissioner.

B (9) WORKING CAPITAL.

Without any testimony upon which to base a reduction, the usual allowance of 5% for working capital, materials and supplies was reduced $902,275 by the majority commission and $1,841,214 by the minority commissioner.

If the foregoing eliminations and reductions be restored to the rate base, the "Total Property Used and

Useful" of The Ohio Fuel Gas Company, as found by the majority-commission (Sheet 1, Ex. B; R., 179) would be $118,956,793 as follows:

Value found by majority commission.....	$74,538,280
Market value of leaseholds.....	4,188,817
Gas reserves.....	15,265,706
Going concern value.....	7,184,815
Gas well construction and equipment.....	10,387,311
Work in progress.....	234,295
Cost of organization.....	1,999,922
Cost of financing.....	3,199,876
General overheads.....	1,055,496
Working capital, materials and supplies....	902,275
	$118,956,793

The majority commission's "Return @ 6½% (Sheet 1, Ex. B; R., 179) would then be $7,732,192; the "Total Expenses and Return" would be $23,795,046; and the gate price required would be 44.41¢ per M c. f. instead of the majority commission's computed price of 39.022¢ and allowed price of 39¢.

Substituting this gate price on Sheet 1, Ex. C. (R., 182), the allowance for "Purchased Gas—from Ohio Fuel Gas Company" is $2,644,553; the "Total Expenses and Return" would be $3,442,917; and the retail rate required would be 60.7¢ per M c. f. instead of 55¢.

The minority commissioner's "Total Property Used and Useful" (Sheet 1, Ex. B; R., 216) would be $117,762,614. His "Total Expenses and Return" would be

$19,925,665, and the gate price required is 37.19¢ per M c. f. instead of his 31.70¢.

Substituting the gate price on Sheet 1, Ex. C. (R., 220), his allowance for "Purchased Gas—from Ohio Fuel Gas Company" would be $2,214,681; his "Total Expenses and Return" would be $3,046,435; and his retail rate would become 53.71¢ per M c. f. instead of 47.95¢.

If these sundry reductions and eliminations be added to the rate bases of The Ohio Fuel Gas Company, as fixed by the majority commission and minority commissioner, respectively, then the $4,844,988 allowed as a return by the majority commission to The Ohio Fuel Gas Company (Sheeet 1, Ex. B; R., 179), is only 4.07%. The $4,714,079 allowed as a return by the minority commissioner to The Ohio Fuel Gas Company (Sheet 1, Ex. B; R., 217) is only 4%.

The increased price of gas at the city gate is more than the amount allowed by the commission (Majority and minority) for return to The Columbus Gas and Fuel Company, and the above corrections would leave that company with no return at all, but an operating deficit.

B (10) ALLOCATION.

The question of allocation is of vital importance to the company. That the company's property will be taken through the allocation device proposed by the court below is certain. Yet how to present this highly technical matter to a busy court as a single phase of a case bristling with important questions is difficult.

Allocation.

The business of producing and transporting natural gas is a single enterprise which cannot be split up and adjusted to the method of allocation upheld by the court below without drastic and costly changes in the present method of doing business.

"Impossible" is a very strong word, yet not only do the company's engineers and managers say that the so-called "demand-mileage allocation" is impossible in respect of this particular property, but the Public Utilities Commission unanimously found it to be impossible.

The majority opinion says:

> "Owing to the method of conducting the enterprise it is **absolutely impossible** * * *." (R., 166.)

The minority commissioner held against the so-called "demand-mileage" system on account of

> "the impossibility of determining a factor which would reflect justly the credit that should be given a particular community * * *." (R., 195.)

We are confronted with an order of the court below to the commission to make a valuation of the transmission portion of the property in a manner which the commission unanimously says is impossible, and which to make possible would require the company to adopt a different method of operation at a greater cost. Certainly this is the taking of property without due process of law.

Yet how to get this over to the court without the

court's wading through thousands of pages of transcript and hundreds of exhibits, and attempting to determine how a business should be managed or conducted, is the problem which confronts counsel.

If we seem too prolix, too much given to detail, or seem to be presenting questions of business management, we hope the court will be patient with us and realize that what the court below has attempted to do is to take over and decide a question of business management—and that question has been wrongly decided both from the standpoint of law and management.

The trouble with our problem is that the mere statement of the holding of the court below seems reasonable on its face. It is only when we attempt to get a definition of the terms used in the proposition, and then to apply the proposition to concrete operating conditions existing in the utility that we encounter the trouble.

The court below cites what it claims to be authority for its position. Yet even the cases cited are not authority and the practices there referred to have been abandoned by the West Virginia Public Service Commission.

The court below held (R., 51):

> "2. In determining the rate base for a natural gas company, production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned between different localities served, on proportionate sales basis.
>
> 3. In determining the rate base for a natural gas company, transmission system, valuation, and

expenses should be apportioned between localities served on the demand mileage basis."

Assuming that we know what constitutes the "transmission system" and what a "demand-mileage basis" is, those propositions do not seem bad on paper. Naturally, we would assume that the mileage referred to was the mileage through which the gas traveled from the well to the point of delivery. But that isn't what is meant at all. What is meant is the distance from the "last point of major compression." (R., 1907; 1910; 1914; 1922; 1936; 1961; 1969; 1970; 2109.)

We would also assume that the mileage would be the actual mileage of at least some part of the transmission system. But again we would be wrong. The mileage is of one single hypothetical pipe (although actually there are a number in use) from the nearest compressor station, which is denominated "the last point of major compression". (R., 1772; 1801-1802; 1805; 1821; 1831; 1918; 1919.) The fields may be, and are, miles back of the "last point of major compression". Indeed, the gas sometimes passes through at least three different compressor stations before it reaches the "last point of major compression". (R., 1787; 1794; 1843; 1944; 1961.)

Even the court's statement: (R. 59)

> "The city contends that the production property of The Ohio Fuel Gas Company should be allocated upon the basis of sales, but that the transmission property should be allocated to the particular market in this locality upon the basis of mileage multi-

plied by the peak demands of the particular municipality.''

sounds simple enough, although one may wonder just how "peak demands" are determined.

If you have followed us thus far you will surely begin to detect the Senegambian. The amount of the property used and useful in transporting gas to Columbus is not identified and valued. Instead, the city's engineer has computed the average use and distance to Columbus of two hypothetical pipe lines and used this average as an allocation factor which he applies to both the total present value and the total operating expenses of The Ohio Fuel Gas Company.

At R., 1919 the city's engineer was asked and answered:

> "Q. What I am trying to get in my humble way is whether or not you considered both of those 12-inch lines that start out of Homer?
>
> A. We did not consider any lines, sir, as lines. We considered lines only as indicating distance and it would not have made any difference in our allocation if there had been a dozen 12-inch lines going out of Homer in that direction."

The hypothetical pipe lines used as the yardstick do not extend to any gas well or gas field. While the gas reaching Columbus may and does come through various compressor stations and from various gas fields, and while there are a number of different pipe lines into Columbus from each of the two selected compressor stations, the city's engineer assumed a single pipe line from

Wheeler Compressor Station, 33.9 miles southeast of Columbus, and a single hypothetical line from Treat Compressor Station, 27.7 miles northeast of Columbus. (This station is frequently called Homer.)

The evidence shows that The Ohio Fuel Gas Company has 38 compressor stations located in various parts of Ohio. (pp. 10 and 11 of Co. Ex. 45, R., 1787; 1794.)

The 3662 gas wells of The Ohio Fuel Gas Company are located in what is divided into six different districts in the state of Ohio.

Most of the gas which comes into Wheeler and Treat Stations comes from other compressor stations through other transmission lines. (R., 1787; 1974.) In no sense can either Wheeler or Treat Station be considered a source of gas supply. They are merely the last points of compression before the gas reaches Columbus.

This method of allocation is particularly unfair in the matter of operating expenses. Items of dollar expense have far more effect upon the rate and the actual honest-to-goodness return than do dollars of valuation.

Before discussing method of operation and before pointing out that the cases relied upon by the court below are not precedents for the court's holding in the instant case let us direct attention to what was said by the commission in respect of this method of allocation ordered by the court below.

First we will take up the minority commissioner. (R., 194.)

> "The company contends that there can be no particular allocation of either the production or trans-

mission property to any one market except upon the basis of sales or consumption of gas. The city, in direct conflict with this, contends that production property should be allocated upon the basis of sales, but that the transmission property should be allocated to the particular market upon a basis of mileage multiplied by peak demands of the various communities. The city has designated this plan as the demand mileage basis of allocation.

I am impressed with the fact that this property has been built up by the bringing together of many other distributing, producing and transmitting gas properties; that it is operating as a unit and that the complete structure which has been built is really used and useful for the furnishing of gas throughout the territory and that in an attempt to allocate any particular portion of the property to a given market so many divergencies appear and so many errors are apparent, producing inequalities as between various communities that I have discarded as impracticable and unreasonable the plan submitted by the city for allocation and am fixing approximately a gate rate which will be available throughout the territory served by The Ohio Fuel Gas Company.

I have not been forced to this position by the desire for an easy way out or because of relief which it would give in the investigations which are being conducted throughout the state, but rather by the impossibility of determining a factor which would reflect justly the credit that should be given a particular community because of the proximity to the market of the varying transmission lines which would be necessary to reach the gates of the many cities served. Columbus gas may come from West Virginia, it may come from southern Ohio fields or from northern Ohio fields. It may be brought through one of several transmission systems or compressed in one station or in many. It is probable

that gas will some day be brought into this system in Ohio from the west.

It is **impossible** to trace this gas in any portion of the system and it is the pressure applied from the various sources that determines the flow of the gas rather than the source of any one transmission line."

Beginning at the bottom of page 166 in the majority opinion, it is said:

"The evidence clearly established that the system operated by The Ohio Fuel Company is built upon the plan that gas wherever produced is subject to be distributed to any point in the state where it may be required. Gas from the northern part of the state may be consumed in the southern and gas from West Virginia may be distributed to any of the numerous gateways in Ohio. So it is with gas purchased by the company. The difficulty that confronted the commission was to ascertain by some reliable evidence how much property was actually devoted to the service of Columbus. Owing to the method of conducting the enterprise it is **absolutely impossible** to say that one pipe line or one well may be devoted to Columbus and that another pipe line or well may not be. As a matter of fact, gas is produced or purchased wherever available and transported in a system of interlocking pipe lines to the point of consumption and it may be broadly said that the entire system within the state of Ohio has at some time and to some extent been devoted to the service of every municipality served by the company.

Two methods of solution were suggested; the city contends that the production property should be allocated upon the basis of sales but that the transmission property should be allocated to the particular market upon a basis of mileage, but dependent

upon peak demands of any locality served. The company, on the other hand, contends that there can be no definite allocation of either the production or transmission property to any one consuming district upon any other basis than that of the gas consumed in the particular locality. Testing out the two theories it soon developed that the contention advocated by the city would result in highly different gate rates to communities which might be in close proximity. If the allocation of the property is measured by the gas consumed all communities bear an equal burden of a gateway price and there can be reasonable harmony as to the gateways of the several cities. Economically considered, we are of opinion that a substantially similar gateway price in each community would work to the welfare of our state rather than having one city which might enjoy a comparatively low rate while some other city might bear a high rate. This difference in gas rates between different cities might result in an unjust preference to the manufacturer and to the home owner in one city over those in another. Aside from this economic situation, it is practically **impossible** to allocate to the gateway of Columbus property used and useful for furnishing gas in any other method than that suggested by the company." (Boldface ours.)

The commission had before it all of the cases which the court below considered. To one who had not heard the evidence or read the record, those cases might seem to uphold the position taken by the court below. However, when they are understandingly examined, we find that they differ materially from the court's demand mileage.

In the first case cited, **Re United Fuel Gas Company,**

P. U. R. 1918C, 193, the commission apportioned the transmission investment of a system which we know to have been very much simpler than the 1929 system of The Ohio Fuel Gas Company (R., 1987.)

> "upon the basis of demand **and sales** weighted by distance, as shown in Erickson's tables Nos. 4, 5 and 14".

Immediately, without consulting Mr. Erickson's several tables, it is to be noted that this basis differs from the one laid down by the Ohio Supreme Court in that **demand and sales** are weighted by distance, which certainly is different from mileage multiplied by peak demands.

The next case cited, **Re United Fuel Gas Company,** P. U. R. 1918C, 453, differs very sharply not only from the Ohio Supreme Court proposal, but from the method followed in the preceding West Virginia case. This method is set forth at page 470, and is as follows:

> "The method used in determining the cost of gas in various communities along the line is exactly the same as that used by the Interstate Commerce Commission in computing the cost of freight along main and lateral lines."

Certainly the Interstate Commerce Commission does not determine freight rates on the basis of "mileage multiplied by peak demands".

The method is further set out on page 470, but we will not take the court's time with it because it is wholly unlike what has been ordered here.

Allocation.

The next case cited by the court below is, **Re United Fuel Gas Company**, P. U. R. 1920C, p. 583. At page 606 of that case it is said:

> "As will hereinafter appear, in apportioning the value of applicant's property and its earnings and expenses as between its wholesale and retail business, and as between localities and divisions, we have followed substantially the rules and principles laid down in Bulletin No. 43, Case 585 (Re United Fuel Gas Co., P. U. R. 1918C, 193), and will not here repeat what we there said. However, in making this assignment and apportionment, less weight has been given to the distance factor in allocating the transmission investment, for the reason that taking into consideration applicant's whole system of connected mains and lines, its various compressor stations and the location of its sources of gas supply, aside from leakage and waste in transmission, **the distance factor seems to have but little more than nominal effect upon the cost of transporting gas from applicant's fields to its several West Virginia divisions.**" (Boldface ours.)

The next case cited by the court below is **In re Hope Natural Gas Co.**, P. U. R. 1921E, 418. Here the transmission **investment** was allocated on the basis of "sales weighted by distance", which, again, is entirely different from "mileage multiplied by peak demands". But the most important feature here is that transmission expense was allocated on a direct sales basis (see p. 435).

The next case cited by the court below is **United Fuel Gas Co. v. Railroad Commission of Kentucky**, 13 Fed. (2d), 510. It is true that in that case Judge Hickenlooper did say that the transmission system valuation

and expenses would be allocated upon the demand mileage basis. (This had been agreed to.) What the demand mileage basis was in that case we do not know. When the case was brought to this court no point was made on the question of allocation. (278 U. S., 320.)

In examining plaintiff's brief submitted to Judge Hickenlooper we find the following statement at p. 49 under the title of "Allocation":

> "The experts for both parties agree upon the basis of this distribution, and there is no difference between them as to the proportionate part of each item of value which should be attributed to each service."

The last case relied upon (in order of mention) is that of **Wabash Valley Electric Co. v. Young**, 287 U. S., 488, which was an allocation involving neither demand mileage nor peak loads.

We want at this point to lay down the proposition, without reservation, that in adopting a sales basis allocation the Public Utilities Commission of Ohio in the instant case followed exactly the procedure approved by this court in the Wabash Valley case.

In analyzing the **Wabash Valley** or **Martinsville case**, Mr. Justice Sutherland said (p. 499):

> "Upon the basis adopted, that is, first to value the local property and then add to that proportionate part of the value of the general distributing system found to be fairly attributable to the Martinsville service, * * *."

Allocation.

In the majority commission opinion in the instant case it is said (R., 167):

> "We have, therefore, unanimously reached the conclusion that the producing and transmission properties should be allocated to the gateway of Columbus in proportion to the gas consumed by Columbus bears to the entire volume of gas produced throughout the system."

The minority commissioner (R., 195):

> "* * * I have discarded as impracticable and unreasonable the plan submitted by the city for allocation and am fixing approximately a gate rate which will be available throughout the territory served by The Ohio Fuel Gas Company."

In discussing "allocation" in the Martinsville case, Mr. Justice Sutherland called attention to the decision of the Ohio Supreme Court in **Hardin-Wyandot Lighting Co. v. Public Utilities Commission**, 118 Ohio St., 592-601. We called the attention of the court below to its decision in said case, but the court paid no attention thereto and made no mention thereof.

In the opinion by the three-judge court in the **Martinsville case** (Wabash Valley Electric Co. v. Singleton, 1 Fed. Supp., 106, 108), it was said:

> "In fixing the value of plaintiff's property used and useful for the supplying of electricity to such city, defendant commission fixed first the value of its local property."

(That is exactly what was done by the Ohio commission in the instant case, except that the property allo-

cated in the Martinsville case belonged to the same company which owned the Martinsville distributing system.)

> "It next fixed the gateway price for all electrical current furnished by it to Martinsville, this being the price allowed for such current at the city limits."

(This is what was done by the Ohio commission in the instant case when it fixed appellant's allowance for gas purchased from The Ohio Fuel Gas Company.)

> "In determining this price it took the average cost per kw. h. of all current handled by plaintiff through its entire system and added thereto an arbitrary amount for depreciation and return. In other words, after determining the value of the local property used and useful in supplying electricity for such city, and determining the gateway price for supplying same, then defendant commission proceeded to fix a schedule of rates therefor without regard to the effect of such procedure upon the rate of return which plaintiff will realize from its entire system upon the entire value thereof."

(That is in principle what the Ohio commission did in the instant case.)

The Columbus Gas & Fuel Company since 1914 has been engaged exclusively in the distribution of gas. Since that date it has produced no gas, but has purchased its supply at wholesale. Ohio law permits one corporation to own the stock of another corporation (G. C. 8623-8). The purchase by Columbia Gas & Electric Corporation of the capital stock of The Columbus Gas & Fuel Company did not destroy the identity of the Columbus

company. As said by the chief justice in the **Illinois Bell Telephone case**, in respect of the ownership of the Illinois company by the A. T. & T., 282 U. S. (p. 152):

> "The corporate organization of the Illinois company not only created a legal person amenable as such to governmental authority, but facilitates the examination of the particular transactions subject to that authority."

So here, The Columbus Gas & Fuel Company is a legal person amenable as such to the city of Columbus and the Public Utilities Commission of Ohio.

Returning to the opinion of the three-judge court in the **Martinsville case**, it is said (p. 109):

> "To give it any other construction would make the very law which was enacted for the benefit of municipalities and the inhabitants thereof, as well as for the benefit of the utility, prohibitive from the viewpoint of the public. It would make it necessary to have all the property of the entire system appraised each time a single municipality, or ten or more of its citizens, petitioned the defendant commission for a revision of its rates. The expense alone, if allowed to be taxed as an operating expense, as contended by plaintiff, would be so great that in many if not every instance it would result in an increase instead of a reduction in rates."

That the court below misunderstood the **Martinsville case** (Wabash Valley) is apparent from the following quotation from the opinion of the court below, under the heading "Allocation":

> "This circumstance was held to have great weight in Indiana, where the demand of various utilities

that a **common gate rate** be fixed was denied upon the ground that in Indiana the city, and not the system, is the unit."

This is the exact opposite of what was held in that case. There the Martinsville gate rate was fixed on a kw. h. sales basis, just as in the instant case the commission fixed the Columbus gate rate on a M c. f. sales basis. A "common gate rate" was fixed, to which was added a Martinsville distribution rate. In the Martinsville case, the utility wanted a system wide consumers' rate, not a Martinsville rate fixed according to a gate rate plus the amount required for local expenses and a return on the value of the local plant. As stated by Mr. Justice Sutherland (287 U. S., 495):

"Appellant's chief contention is that its entire property should be taken as a unit in fixing the rate base * * *."

An analogous situation would be created if The Ohio Fuel Gas Company, which produces and transports the gas to Columbus, were also the distributor in Columbus and were to demand the same burner tip rate in Columbus that it received at retail elsewhere in its system.

The case of **Tulsa Tribune Company, et al. v. Oklahoma Natural Gas Company**, 126 Okla., 280; 261 Pac., 213; P. U. R. 1925D, 628, had facts and atmosphere so similar to our case that we quoted freely in our brief below from both the commission and Supreme Court of Oklahoma.

That was a case where a newspaper brought a proceeding before the commission asserting that on account of the favorable geographical location of Tulsa with respect to the natural gas fields of the state, a zone rate should be created for the benefit of the city of Tulsa due to its proximity to the gas fields.

The commission reached the conclusion that in view of the fact that gas was put into the transmission line at both ends thereof and at many places in between, it was impossible to allocate to any one town or city, or to any two or more towns or cities, with any degree of certainty any certain portion of the Oklahoma Natural Gas Company's production and transmission property. The commission found that it was impossible to determine with any degree of certainty from what particular place any city or town was getting gas inasmuch as it could go north on one day and come south on another day. The commission held that the only practical method to pursue was to treat the Oklahoma Natural Gas Company's production and transmission property as an entity and to treat it as though it was owned by a separate corporation altogether and was selling the gas to each distributing plant at the city gates or town borders and all at the same price.

The newspaper carried the case to the Supreme Court —**Tulsa Tribune Company, et al. v. Oklahoma Natural Gas Company**, 126 Okla., 280; 261 Pac., 213; P. U. R. 1928B, 376, where the commission was affirmed.

By examining the qualifications of the city's two wit-

nesses—Allensworth, who was used in respect of the Columbus distribution plant and Ohio Fuel expenses, and Blundon, who was used in respect of The Ohio Fuel Gas Company's property, it will be found that neither of them ever had a moment's experience of any kind in any department or division of a natural gas producing, transporting or distributing enterprise. Mr. Allensworth had left school at the age of ten (R., 417). Mr. Blundon had an engineering education. Both of these men are professional witnesses. By that is meant that this is their only means of livelihood. As we shall point out under the subject "Due Process of Law", neither of these men were qualified to testify as experts. Neither of them made a valuation. What they did was to take the company valuations and expenses and recompute them according to their own theories—merely a clerical job. That their technique is directed toward securing compromise figures is plainly deducible from their cross examinations.

Mr. Blundon had testified before the Public Service Commission of West Virginia in the United Fuel Gas Company case, on behalf of one or two of the cities (R., 493; 496). In that case the commission had adopted an agreed upon allocation between the intrastate and interstate business. On behalf of the cities, Earl L. Carter, former chief engineer of the Public Service Commission of Indiana, worked out with the officials of United Fuel Gas Company the agreed upon allocation (R., 1892; 1990; 2065). Mr. Blundon wrote to Mr. Carter request-

ing that Carter loan him Carter's work sheets and other data used in the West Virginia allocation (R., 2040). This Carter did. Blundon then attempted to make a similar allocation of The Ohio Fuel Gas Company's property, but was unable to do so and abandoned the plan. We established this fact by calling for and introducing Blundon's first working papers. (R., 1951; 1953; 1989, Co. Ex. 161-A to 161-U.)

The Carter plan used in West Virginia for separating the state from the interstate gas carried the transmission system back to the fields, and did not stop at the nearest compressor station. (R., 1990, et seq.). In the West Virginia case there were available measurements of gas deliveries at various points and five days of the same year had been taken as a basis of peak demands. (R., 1892; 1989.) Blundon's first work papers show that he tried to follow the Carter plan. That is, he started out to obtain the sources of supply in order to determine distances traveled. He collected considerable information and copied all the records in respect of gas purchased by The Ohio Fuel Gas Company from producers in the state of Ohio. When he attempted to obtain the amount of gas from the producing fields of The Ohio Gas Fuel Company and found that there were no such records, he abandoned his plan of tracing gas from the source of supply and adopted what he termed the "last point of major compression" as the source of supply. (R. 1910; 1969; 2009.) He adopted the Wheeler Compressor Station, located 33.9 miles southeast of Columbus

in Fairfield county, and Treat Compressor Station, located 27.7 miles northeast from Columbus in Licking county, as the sources of supply from which to compute the mileage traveled by the gas delivered to Columbus. Then instead of computing the miles of actual pipe lines coming into Columbus from those two compressor stations, he assumed and used as his allocating yardsticks a single hypothetical pipe line from Wheeler Compressor Station to Columbus and a single hypothetical pipe line from Treat Compressor Station (sometimes called Homer) to Columbus. (R., 1919.) He then assumed that the relation which the total valuation and expenses of The Ohio Fuel Gas Company bore to the Columbus gas supply was to be measured by the relation which his yardsticks bore to the entire transmission property. However, he first weighted his yardsticks by the proportionate use which Columbus was supposed to have made of the hypothetical lines. The fact is that Columbus takes its supply off of lines which are used to supply other communities.

To get his peak demands he took the deliveries of a single day in 1929 and averaged them so far as he could with a single day in 1930. (R. 1908; 1922.) Where he could not get data, he estimated or manufactured it. (R., 1989; 1994 to 1998; 2011.)

Mr. Blundon's results were so fantastic, that we sent for Mr. Earl L. Carter, the Indiana engineer whose plan Mr. Blundon claimed he was following, and gave him a carte blanche to make a demand mileage allocation of the

property of The Ohio Fuel Gas Company. (R., 1986; 2011.)

Mr. Carter made an independent investigation and reported to the commission three essential facts:

(a) The West Virginia allocation (which was agreed upon between the company and the cities) was made for an entirely different purpose from that for which Mr. Blundon had attempted to use it in Ohio. In the West Virginia case the allocation was not made as between cities and towns in West Virginia, but was made between the intrastate and out of state business (R., 1988).

(b) The method used by Blundon in his Ohio Fuel Gas Company allocation did not conform to the method used in the West Virginia case (R., 1989).

(c) Because of the nature of the property and the method of its operation (R., 1988), neither the allocation plan adopted and used in West Virginia nor the plan adopted by Mr. Blundon, nor any other method of allocation except upon a volume or sales basis, can be used in respect of The Ohio Fuel Gas Company property (R., 1998-1999).

At page 2011 of the record, Mr. Carter asked what his instructions were upon his arrival here, and he answered:

> "I was instructed to make a demand mileage allocation of The Ohio Fuel Gas Company, if at all possible.
>
> Q. (By Commissioner Geiger:) And you reported back it couldn't be done? A. I did."

At page 1988 of the record, Mr. Carter was asked to give his reasons why the same kind of an allocation

could not be made of the Ohio Fuel property that was made of the United property, and he answered:

> "Because your systems are not the same, and because your Ohio Fuel Gas system is so interconnected and interwoven that it is impossible to get information such as was used in West Virginia, and the allocation in West Virginia was for an entirely different purpose than the allocation in Ohio. The gases are so intermingled, the systems are so interconnected, that it is not possible to get accurate information."

(See also p. 1999.)

Mr. Carter's qualifications are set forth at page 361, et seq. of the record. He holds two engineering degrees from Purdue University; during the summer of 1913 he was connected with the engineering department of the Public Service Commission of Indiana; from 1914 to 1917 he was with the Western Electric Company; from May, 1917, to May, 1918, he was a member of the engineering staff of the Public Service Commission of Indiana in the capacity of acting assistant chief engineer; from May, 1918, until the latter part of November, 1918, he was in the army in signal corps work; from December 1, 1918, until January 1, 1922, he was assistant chief engineer of the Public Service Commission of Indiana; from January 1, 1922, to April 1, 1928, he was chief engineer of the Indiana commission. Since April, 1928, he has been in private practice dealing in utility rate and investigations of various kinds.

The following testimony of Mr. Carter appears at pages 1986, et seq., of the record:

Q. Have you made a study of the operating conditions of The Ohio Fuel Gas Company? A. I have.

Q. Were you asked to make an allocation of The Ohio Fuel Gas Company's property on the same basis as an allocation was made in the United Fuel Gas case in West Virginia? A. I was.

Q. Have you seen and studied the maps and general plan and system of The Ohio Fuel Gas Company? A. I have.

Q. Have you seen and studied the plan of other natural gas systems? A. I have.

Q. Have you made allocation studies of other natural gas systems? A. I have.

Q. When and where? A. I have made allocations of other natural gas systems in Indiana, Kentucky and West Virginia covering the last ten years, at different times.

Q. About how many companies would you say? A. Of natural gas and combination natural and artificial gas, approximately ten I would say in round numbers.

Q. How does the system of The Ohio Fuel Gas Company compare with other systems? A. The system of The Ohio Fuel Gas Company is much more complicated and interconnected than any of the other systems.

* * * * * * * * * * * * * *

Q. What method of allocation have you used in the past? A. I have used, I think, every known method of allocation at some time or other on various problems.

* * * * * * * * * * * * * *

Q. Have you studied Mr. Blundon's working papers on The Ohio Fuel Gas Company allocation? A. I have studied a photostatic copy of his working papers, yes, sir.

Q. What have you to say as to the method pursued by Mr. Blundon in that case as compared with the method which you pursued in the West Virginia case? A. The methods are entirely different. There are some similarities but the basic figures are entirely different, because it was possible in the West Virginia case to get actual demands and actual measurements, and that is not possible in the Ohio case.

Q. What about Mr. Blundon's adjustments or lack of adjustments in respect of industrial sales in individual cases? A. In some cases of sales adjustments were made to attempt to estimate a maximum demand, and in other cases adjustments were not made, which shows, in my opinion, an inconsistency."

(R., 1999.) "Q. Could you divide the state up into several different districts? A. For operating purposes?

Q. For operating and to get a rate; do the operating conditions of The Ohio Fuel Gas Company admit of getting different rates throughout the state of Ohio in different localities? A. In my opinion, no.

Q. And just tell your reasons for that? A. Well, the system is so interconnected in operation and your gases are so intermingled you cannot tell today where you are going to get your gases from tomorrow. Your operating conditions are varying from day to day.

Q. Does the method of The Ohio Fuel Gas Company's operation make for efficiency and continuity of service? A. It does."

One reason for calling the Blundon allocation "fantastic" can be shown in a single example. There are a number of points of delivery located around the edge of the city of Columbus. At each of these measuring stations,

or points of delivery, Mr. Blundon's work papers (Co. Ex. 210) produce a different gate rate. Two of these stations, however, are located on the same line and the gas which comes to both of these stations must necessarily come from the same compressor station. The point of delivery nearest the compressor station is the Linden Measuring Station. For this station Mr. Blundon's rate, according to his own work papers, is shown to be 41.29 cents per M c. f. (R., 5946); while at the Cleveland Avenue Station, approximately two miles from the Linden Station and that much further away from the compressor station, Mr. Blundon's rate is 20.19 cents per M c. f. In other words, gas traveling two miles further through the same pipe is worth less than one-half of the price at the Linden Station which it had passed.

The company's engineers took Blundon's work sheets (Co. Ex. 207) and worked out on the Blundon demand mileage basis, using Blundon's own figures, the various gate rates throughout the state of Ohio and we introduced this as Company Exhibit 196. This exhibit shows that, according to the Blundon rates, Bay Village, a little community near Lake Erie in the northeastern part of the state, would have a rate of 16.75 cents per M c. f., using a very small amount of gas; while Toledo, a large city located in the northwestern part of the state, would have a gate rate of 98.14 cents.

As said by the majority commission (R., 167),

> "Testing out the two theories it soon developed that the contention advocated by the city would re-

> sult in highly different gate rates to communities which might be in close proximity."

while the minority commissioner said (R., 195):

> "* * * in an attempt to allocate any particular portion of the property to a given market so many divergencies appear and so many errors are apparent, producing inequalities as between the various communities that I have discarded as impracticable and unreasonable the plan submitted by the city for allocation."

Another reason for calling the demand-mileage allocation "fantastic" is that under the laws of chance or average it is practically impossible to get the same answer by the use of any other hour, day, week or year than the particular one or more selected as "peaks". If Mr. Blundon nad taken January 14 as his peak day, the gate rate found would have been different from the gate rate found by using January 13 as the peak day The evidence shows that on account of the variations in temperature, and especially of wind, the peaks of different communities vary from day to day and are seldom coincident.

Additional Illustrations of How the Company's Property Will Be Taken Without Due Process of Law Through the Demand-Mileage Allocation Ordered by the Court Below.

(1) Mileage:

While actual mileage was not used in the demand-mileage allocation, yet because of the insistence of counsel for the city that mileage—or the distance traveled by the gas in reaching Columbus—be considered in determining the allocation of the property and expenses of The Ohio Fuel Gas Company, we called Frank Phillips, the man whose duty it was to see that the various localities served by The Ohio Fuel Gas Company received a sufficient amount of gas at all times. A complete and detailed description of the Ohio Fuel Gas system was given to the commission by this witness. Every line and compressor station was located and described and the inter-connections between the compressor stations and transmission lines were shown. (R., 1787, et seq.) The facts as to the routing and rerouting of gas, the several fields from which and the transmission lines and compressor stations through which Columbus and other localities were served, were developed. (R., 1772; 1787, et seq.) The passage of gas in opposite directions through the same lines at different times and the importance of stored gas through the packing of the lines, were explained. (R., 1800, et seq.) The direction of flow is determined by pressure which may be applied from various sources. (R., 195.)

Allocation.

The impossibility of the company, or any one else, determining the sources from which gas reached Columbus and the distances traveled by the gas became perfectly clear. The system of The Ohio Fuel Gas Company was inter-connected in order to make possible the service to its entire market at a reasonable price. To take it apart and attempt to allocate certain parts to Columbus and certain parts to other localities, would be to destroy both the continuous and uninterrupted service as well as the economy of operation. (R., 1885; 1999.)

It would unduly extend this brief to attempt to discuss here the details of the system, with its interconnections, as shown by the evidence. Suffice it to say that the findings of both the majority and minority commissioners on this point are thoroughly sustained by the evidence and in accordance with the facts.

While Phillips was able to present an estimate of the gas passing through Wheeler station on two different days and to show the proportion of gas which was interstate on those days, he made it clear to the commission that the sources of the gas and routes traveled by it would be different on any other day selected, and that in fact the sources of the gas and routes traveled changed as between different hours of the same day. (R., 1784; 1804; 1823.) He showed that adequate service requires a system so constructed and operated as to make the foregoing possible. (R., 1804; 1806; 1835; 1839; 1857.)

Notwithstanding the obvious fact that such an interconnected system is a benefit to the city of Columbus,

not only in respect of an adequate and continuous supply of gas but in matter of lower costs, the city urged upon the commission an allocation based upon assumed conditions, under which it was shown by the evidence that the company could not operate, and which would at least wreck the service and increase the costs.

(2) Connections Between Compressor Stations:

The practice of shifting the load of a compressor station to some other compressor station in case of trouble is not provided for in the demand-mileage allocation (R., 1805). This includes both valuation and expense.

The fact that the company has connected Treat and Wheeler stations with Line K-30 in order that these stations may help each other in supplying their respective markets is not considered of any value in the demand-mileage allocation. (R., 1789; 1801; 1862.) No consideration is given to such situations as exist, for example, at Perrysville station. This station can discharge its gas to Brown, Ashland, Pavonia, York or Treat stations as may be needed. When discharging to Brown station, Perrysville station would use Line L-76 as a discharge line. When discharging to Ashland this station would use Lines L-43, L-740 and L-660 as discharge lines. Through this same routing gas may be delivered to Pavonia, York and Treat stations. (R., 1793.) This is but one of many examples where the routing of gas from a compressor station is frequently changed to meet the demand.

Line H between Elk, Hagan, Hislop, Crooksville and Wheeler (R., 1800), Line D between Pavonia and Treat stations (R., 1797) and Line L-221 out of York and into York (R., 1792) are other examples of the interconnection of compressor stations designed and used to insure continuous service and adequate pressure for which no credit is given in the demand-mileage allocation.

(3) Operation of Wells by Classes:

Another extremely important feature of the operation of The Ohio Fuel Gas Company is disregarded by the demand-mileage allocation. The Ohio Fuel Gas Company has four sources of gas from which to supply its customers:

(1) 3662 wells scattered through northern, eastern, southern and central Ohio.

(2) Gas purchased from independent producers scattered throughout the state, located very largely in the same areas as the company-owned wells.

(3) Gas purchased from the West Virginia company.

(4) Gas stored in The Ohio Fuel Gas Company's transmission system.

In respect of the company's own wells, prudent management requires that these wells be classified and operated in certain order. These wells are classified into what are designated A, B, C, D and E wells, as follows:

A. Light rock pressure wells which may be destroyed if shut in.

B. Wells which off-set competitive wells of other producing companies.

C. Wells off-setting the wells of independent producers from which the company purchases gas.

D. Wells which are slightly competitive.

E. Wells that are protected from competition with independent or competitive companies.

The wells are turned on in the above order and are turned off in the reverse order. (R., 1785; 1795; 1796.) Thus because of their character, Class A wells are turned on the major portion of the time. Class B wells are turned on whenever the competitive wells of other companies are turned on. If Class B wells were not turned on, the competitive wells would draw the gas from the company's acreage. (R., 1785.) Class C wells are operated in accordance with the contracts with independent owners. (R., 1785.) During the winter periods when the wells of the independent producers are delivering their maximum volume into the lines, the company's off-set or Class C wells must be drawn upon in like proportion. (R., 1785.) During the summer periods the company's Class C wells are shut in whenever the independent producers' wells are off the line. Class D wells are turned on whenever Classes A, B and C are unable to furnish the desired amount of gas. (R., 1786.) Class D wells are turned off before Classes A, B and C. Class E wells are turned on only when all other sources of supply, including the gas purchased from West Virginia, are insufficient to supply the demand. (R., 1796.)

Thus the source of supply for any market is constantly changing and the mileage traveled by the gas changes accordingly. This change of source and distance occurs daily and even during the course of the day. (R., 1823.) The heavy demands may be in the morning and the E wells will be turned on. Later in the same day when the demand is decreased the E wells will be shut in.

Demand-mileage allocation gives no consideration to the foregoing. Mr. Blundon did not even understand or know about it. He assumed for the purpose of demand-mileage allocation that Bay Village, in Cuyahoga county, was served with local production. The wells adjacent to Bay Village are Class E wells. The greater part of the year these wells are shut in and Bay Village is supplied from York station, Treat station or Pavonia.

(4) Effect on Gas Purchased Contracts:

The company's operations must also be regulated to conform to the requirements of its purchased gas contracts. (R., 1785.) If gas purchased from independent producers is being delivered to industrial consumers and they should shut down, the company must find a market for this gas in addition to the gas from its own Class C wells, since its contracts require it to take the purchased gas. Unless the company continued its off-set (Class C) wells in operation, it would be buying its own gas through the independent producers' wells. The result is that this gas must be routed to some other market

and the supply for that market changed or curtailed.

Blundon's cross examination and his working papers show that the demand-mileage allocation gives no consideration to the necessity of rerouting gas, or to the necessity of changing from one source of supply to another, or to the advantage to all markets of the storage capacity of the system and of the operation of the entire system as a unit. (R., 1857.)

(5) Failure of Gas Supply:

The fact that the system is so constructed that any market depending upon The Ohio Fuel Gas Company can be supplied under almost any contingency of pipe line failure, compressor station failure, or failure of supply, would be given no consideration in a demand-mileage allocation.

As an illustration of failure of supply of gas, we call the court's attention to the fact that during the years 1926, 1927 and 1928 practically all of the gas reaching Columbus was produced in the Cambridge field, deliveries being made through Treat station and Line B to Columbus. (R., 1783.) At the time of the hearing the Cambridge field could deliver only three million cubic feet of gas a day with the aid of four compressor stations, as compared to its 1926 peak of sixty million cubic feet per day without the aid of any compressor station. The older fields go out and new fields come in constantly. No Ohio market should be tied to a single field. (R.,

1857.) Getting service from new fields and new wells is the plain necessity of the natural gas business.

The record shows the history of the gas business in the state of Ohio and the numerous gas companies which began the distribution of gas in various localities throughout the state, only to go out of business shortly when their gas supply failed. (R., 1052; Co. Ex. 57.)

The effect of the allocation ordered by the court below will be to destroy the unified system of The Ohio Fuel Gas Company designed and built to eliminate the danger of failure of supply. Instead of a common reservoir from which all markets may draw their gas as needed, the proposed allocation would again split the state up into small areas served by specific sources of supply, with no provision for service from new or different sources.

(6) Additional Investment Required to Obtain Data For Making Rates by Demand-Mileage:

In adopting demand-mileage allocation, the court below gives no consideration to the tremendous additional investment and increased expense which would be necessary in order to initiate or continue the fixing of rates. A meter would have to be placed at the border of each city, recording gauges installed in order to obtain the daily readings, and through such readings the maximum demands of each place obtained. Meters would have to be placed on each well in order that the

source of gas be determined, and check meters placed at all cross-overs of lines in the transmission system to determine the flow of gas in the various directions at the various times in order to attempt to arrive at the source of gas, a point which Mr. Blundon entirely disregards when he goes only to the last place of major compression, which is the nearest point to Columbus. (R., 1907; 1970; 2109.)

The demands in each community vary each year, therefore it would be necessary to recalculate the rate for each place as the demand changed, as well as to recalculate the rate whenever the source of supply changed, which in turn would change the mileage. (R., 1815; 1831; 1835; 1837.)

(7) Direction of Flow:

Unable to determine sources of supply from which to figure mileage, Blundon used compressor stations as sources of supply. (R., 1907; 1970; 2109.) Unable to determine maximum demands, Blundon used figures which he found on a map hanging in Frank Phillips' office, which he knew were nothing but Phillips' own rough estimates. (R., 1957.) Unable to obtain direction of flow, Blundon used a map attached to Company Exhibit 23, which Mr. Phillips testified was to show the gas coming in and going out of Wheeler compressor station only. (R., 1771; 1828.)

Company Exhibit 23 is an exhibit based upon esti-

mates and prepared and introduced to show the commission the proportion of interstate gas passing through Wheeler station. So far as deliveries from Wheeler station are concerned, the exhibit did not attempt to isolate Columbus and present figures for Columbus alone. The statement to which the map is attached shows on its face that its purpose was to inform the commission as to the per cent. of West Virginia gas and the per cent. of Ohio gas delivered into Wheeler station during the year 1929, and the per cent. of West Virginia gas and the per cent. of Ohio gas delivered to Columbus, Cincinnati, Dayton and Toledo markets through Wheeler station during the year 1929. The map was attached merely by way of illustration. Mr. Phillips in his testimony went into the operation of the system in complete detail and thoroughly explained that in so far as direction of flow was concerned, that changed daily and hourly. (R., 1802-03-04.)

Blundon's only qualification to make an allocation was his claimed familiarity with the West Virginia situation. That qualification diasppeared when it developed that he did not make the West Virginia allocation and did not know how it was done. (R., 2040.) His effort to sell his idea to the commission on the theory that it had been agreed upon by the United Fuel Gas Company in West Virginia and approved by the West Virginia commission failed when it appeared he was wrong in both propositions. The United Fuel Gas Company never agreed to any such allocation as Blundon has made in Ohio, and the use of demand-mileage in allocating as

between cities and towns in the same state was discarded by the West Virginia commission.

While Phillips presented an estimate of the gas passing through Wheeler station on two different days to show the amount of gas which was interstate gas on those days, he made it clear to the commission that the sources of the gas and the routes traveled by it would be different on any other day selected and that, in fact, the source of gas and routes traveled changed as between different hours of the same day. (R., 1784; 1804; 1823.) Adequate service requires a system so constructed and operated as to make possible just such a situation. Without such a system the city of Columbus, and all other localities served by The Ohio Fuel Gas Company, would be before the commission demanding that something be done to secure to them an adequate and continuous supply of gas. Notwithstanding the obvious fact that such an interconnected system is a benefit to the city of Columbus not only in respect of an adequate and continuous supply of gas but in the matter of lower costs, the city urged upon the commission and court an allocation based upon assumed conditions under which the company could not operate at all, and which at least would wreck the service and increase costs. Of course, the results obtained by the city's witness, Blundon, reduced the claimed cost of gas at the city gate of Columbus by the simple expedient of attributing to Columbus only a small part of the transmission system valuation and expense and loading the rest on other territories.

Allocation.

The proposed demand-mileage allocation ignores the fact that every one of the company's transmission lines and the compressing stations are linked together so that gas may be delivered through them to Columbus, and that a large amount of gas is continually delivered to Columbus from various sections of the state. The city sought to have the commission conclude that Columbus is favorably located in respect of the source of gas. The commission readily recognized that proximity to compressor stations did not mean that Columbus was favorably located as to sources of supply. On the contrary, the evidence in the case shows that Columbus is not favorably located, and that if the necessary information for a mileage allocation could be obtained, the resulting gate price in Columbus would be above rather than below the average. (R., 1787, et seq.; City Ex. 24.)

Of course, gas is distributed by the shortest haul, but conditions continually develop which make it necessary to deliver gas by the long way around. The Ohio Fuel Gas Company's system is designed and operated for this very purpose, and Columbus in common with other localities served receives the benefit thereof. When Columbus needs gas it gets gas, and the company cannot stop to quibble about the route over which it is to be delivered.

Sources of Gas:

In the course of its opinion the court below said (R., 61):

> "Just why the city of Columbus should be charged for the pipe lines extending to Indiana, to Toledo, and to Cincinnati, we cannot understand."

If the court below had examined the evidence rather than a gratuitous exhibit offered by counsel for the city as a part of his oral argument, the court's mistake of referring to a pipe line extending to Cincinnati would not have been made. There is no such pipe line belonging to The Ohio Fuel Gas Company, and there is no evidence of any line of any kind to Cincinnati.

We are confident that if this court will examine the evidence in this case it will fully understand the justification for considering all the pipe lines belonging to The Ohio Fuel Gas Company as a part of that company's system. When the evidence is examined it will be found, in the first place, that the entire valuation of said lines criticised by the court below makes a difference in the gate price of less than 1¢ **even if no revenues at all from said lines were credited.**

The evidence shows (inter alia, Co. Ex. 44, p. 3; R., 2907) that by virtue of the Toledo lines a credit to operating expenses of $659,438 is made each year for one single item, being the differential charge to The Northwestern Ohio Natural Gas Company. This single credit to expense by itself more than offsets the return on the

entire valuation of the lines to Toledo and the line to the Indiana border.

It is shown that the line which runs to the Indiana border (not into Indiana) is used for packing gas for Columbus prior to days of heavy demand. (R., 1821.)

The court below also said in its opinion (R., 61):

> "By the preponderance of the evidence, the transmission lines north and northeast of Columbus do not contribute to the Columbus gas supply, and the gas rate in Columbus should not share any part of the cost, maintenance or depreciation of these lines."

Had the court examined the evidence it would have found that not only the preponderance of the evidence, but that the **only** evidence in the case showed that the greater part of The Ohio Fuel Gas Company's producing lands and producing gas wells are located north and northeast of Columbus and do contribute, as found by the commission, to the Columbus gas supply. **We mean to say that this is the uncontradicted evidence in this case.**

If the court below had looked at City Exhibit 24, and disregarded all of the company's evidence, it would have found that 2135 of 3565 wells of The Ohio Fuel Gas Company are located "north and northeast" of Columbus.

If the court below had disregarded all of the company's testimony and had looked at City Exhibit 86, pp. 2 and 3, it would have found that out of 291,396 acres of No. 1 gas lands owned and operated by The Ohio Fuel Gas Company, 162,935 acres are located "north and northeast" of Columbus.

Allocation.

If the court below had examined the inventory of The Ohio Fuel Gas Company it would have found that 43½% of the horse power of the compressing stations of The Ohio Fuel Gas Company are located "north and northeast" of Columbus.

In short, if the court below had examined the evidence in this case, it would have found that there was not a single [redacted]le questioning the findings of both the majority and minority of the commission on this subject.

As stated by the majority commission, and based upon the undisputed evidence in the case (R., 166):

> "Gas from the northern part of the state may be consumed in the southern and gas from West Virginia may be distributed to any of the numerous gateways in Ohio. So it is with gas purchased by the company."

The minority commissioner said (R., 195):

> "Columbus gas may come from West Virginia, it may come from southern Ohio fields or from northern Ohio fields. It may be brought through one or several transmission systems or compressed in one station or in many. It is probable that gas will some day be brought into this system in Ohio from the west.
>
> It is impossible to trace this gas in any portion of the system and it is the pressure applied from the various sources that determines the flow of the gas rather than the source of any one transmission line."

As shown by City Exhibit 24; 1833 of the total number of 3565, i. e., more than half of the wells owned and oper-

ated by The Ohio Fuel Gas Company as of June 30, 1929, were located north of Columbus, as follows:

Ashland county	472	wells
Cuyahoga county	41	
Lorain county	101	
Ottawa county	25	
Medina county	374	
Wayne county	308	
Richland county	92	
Holmes county	136	
Knox county	236	
Coshocton county	32	
Tuscarawas county	13	
Hardin county	3	
	1,833	wells

In the counties along the Ohio river beginning at Belmont and going south and west:

Belmont county	7	wells
Monroe county	29	
Washington county	119	
Meigs county	22	
Gallia county	20	
Lawrence county	4	
Total in Ohio river counties	201	wells

In the counties adjoining the Ohio river counties City Exhibit 24 shows the following wells located in the fol-

Allocation.

lowing counties:

Guernsey county	115 wells
Noble county	52
Morgan county	99
Athens county	189
Vinton county	269
Jackson county	182
Total in these counties	906 wells
This leaves in	
Muskingum county	7 wells
Perry county	51
Fairfield county	74
Hocking county	191
Licking county	302
or a total in this group of	625 wells

or less than ten per cent. of the company's wells.

As with the gas wells, so with the leaseholds. Without burdening the court with anything except No. 1, we will use Blundon's City Exhibit 86, pp. 2 and 3, to show the locations of the No. 1 leaseholds.

Out of 291,396 acres of No. 1, 104,217 acres are contained in the counties of Ashland, Medina, Wayne and Knox. Out of the total of 291,396 acres, 135,824 acres of No. 1 are located in counties north of Columbus as follows:

Ashland county	39,303 acres
Cuyahoga county	1,350
Lorain county	7,035

	Allocation.	
Ottawa county	1,350	
Medina county	23,436	
Wayne county	22,532	
Holmes county	9,354	
Coshocton county	3,598	
Knox county	18,946	
Richland county	7,727	
Tuscarawas county	807	
Hardin county	386	
Total	135,824	acres
Taking the counties along the Ohio river, beginning at		
Belmont county	534	acres
Monroe county	1,446	
Washington county	8,414	
Meigs county	1,631	
Gallia county	1,305	
Lawrence county	1,714	
Total of river counties	15,044	acres
Of the counties adjoining river counties:		
Guernsey county	11,855	acres
Noble county	4,075	
Morgan county	4,823	
Athens county	20,342	
Vinton county	25,572	
Jackson county	17,494	
Total of these counties	84,161	acres

Allocation.

Taking the last classification:

Muskingum county	883	acres
Licking county	27,111	
Perry county	4,106	
Fairfield county	8,242	
Hocking county	16,025	
Total of these counties	56,367	acres

(Licking county is slightly north of Columbus.)

Now as to the thirty-eight compressor stations:

On analyzing the location of the compressor stations and wells that are located in counties north of Columbus, it will be readily observed that the greater per cent. of the horse power is located south of Columbus for the reason that many additional stations are needed in the southern and eastern part of this state to recover gas from the lighter rock pressure wells and to handle West Virginia gas. Note the compressor stations north of Columbus as compared with those south of Columbus.

North of Columbus.

Station	Township	County	H. P
Ashland	Montgomery	Ashland	3,300
Avon	Sheffield	Lorain	500
Brown	Brown	Knox	1,550
Cambridge	Knox	Guernsey	690
Miley	Ripley	Holmes	970
North Eaton	Columbia	Lorain	640
Pavonia	Wheeler	Richland	7,400

			Allocation.
Perrysville	Green	Ashland	620
Tonkin	Allen	Hancock	2,700
Treat	Burlington	Licking	5,750
West Salem	Congress	Wayne	970
Wheeling	Wheeling	Guernsey	90
York	York	Medina	2,425
Buckeye	Clay	Knox	300
			27,905

South of Columbus.

Station	Township	County	H. P.
Barlow	Barlow	Washington	640
Benton	Benton	Hocking	650
Creola	Jackson	Vinton	840
Crooksville	Harrison	Vinton	675
Elk	Stock	Noble	645
Gore	Rome	Athens	795
Glenford	Hopewell	Perry	300
Gore	Falls Gore	Hocking	320
Grimes	Marion	Morgan	1,455
Hagan	Elk	Noble	810
Heslop	Whipple	Washington	195
Laurel	Laurel	Hocking	100
Lick	Franklin	Jackson	2,455
Malta	Malta	Morgan	260
Meigs	Bedford	Meigs	895
Richland	Richland	Vinton	3,000
Sonora	Perry	Muskingum	90
Spencer	Spencer	Guernsey	75

			Allocation.
Sugar Grove	Berne	Fairfield	7,400
Sutton	Sutton	Meigs	820
Union Furnace	Starr	Hocking	80
Union	Union	Licking	120
Westland	Westland	Guernsey	560
Wheeler	Berne	Fairfield	13,080
			36,230

43½% of H. P. north of Columbus.

56½% of H. P. south of Columbus.

All of the foregoing data on compressor stations will be found in the Ford, Bacon & Davis appraisal of The Ohio Fuel Gas Company. (See pp. 10 and 11 of Company Exhibit 45.) (R., 1787, et seq.)

While Columbus is not favorably located in respect of sources of gas supply, it is favorably located in respect of transmission lines. By this is meant that more and larger pipe lines pass in or near Columbus than in or near any other city.

The city sought through a demand-mileage allocation to take advantage of a favorable geographical location in respect of source of supply which favorable location does not exist. Such an allocation does not give credit for the many additional transmission facilities by and through which Columbus is assured of a supply. (R., 1805.) Such allocation does not give recognition to the greater unit cost of the gas that comes from the south—the principal source of the Columbus supply. Such allocation method spreads the cost of such facilities upon

the balance of the state, which does not enjoy the transmission facilities enjoyed by Columbus.

Neither Wheeler compressor station on the southeast nor Treat compressor station on the northeast is a source of supply—they happen to be the last compressor stations through which the gas passes before it reaches Columbus. In respect of these compressor stations, Columbus is favorably located, but in respect of source of supply, Columbus is unfavorably located.

The demand-mileage allocation method approved by the court below does not consider the number of lines supplying Columbus otherwise than on a volume basis which throws an undue burden on the rest of the state for facilities enjoyed by Columbus.

The only true cost of a utility's service is the average of the total cost to that utility. With a gas producing and transporting company, the allocation of cost to groups of customers or classes of service or communities is so dependent upon the characteristics of the person making the cost analysis and allocation, that a different allocated cost is usually obtained by each analyst and/or allocator. The different analyses and/or allocations may be made by using assumptions which seem quite reasonable in themselves and which can be supported apparently by argument However, the fact remains that there are so many different ways of attacking the problem that there will be practically as many different answers as there are people engaged to make the allocation.

If the city of Columbus is successful in establishing the demand-mileage allocation which will give it a lower than average gate price, the company's property will be taken without due process of law.

Company Exhibit 176 contains a list of several hundred gas rate ordinances of various municipalities in Ohio served by The Ohio Fuel Gas Company on file with the Public Utilities Commission. Practically all of these ordinances have been accepted and therefore have become contracts under the statute (G. C. 3983), the decisions of the highest court of the state and the decision of this court in the case of **Columbus Railway, Power & Light Company v. City of Columbus**, 249 U. S., 399; 63 L. Ed., 669. The Ohio Fuel Gas Company cannot shift to any of these other localities any part of the transmission costs which Columbus by its demand-mileage allocation is seeking to avoid.

But even if there were no contracts, the necessity of raising the gate prices in other communities in accordance with a demand-mileage allocation would at once curtail the use of gas in such communities, resulting in a reduction of company revenues, which in turn would affect the cost of the service throughout the system.

We introduced a computation made from the evidence in this case of the wholesale deliveries of The Ohio Fuel Gas Company other than to the city of Columbus, using Blundon's method and work sheets for obtaining the gate prices as shown in Company Exhibit 196. These gate prices at other points of delivery range from 50.68

cents per M c. f. to approximately $1.38 per M c. f. These gate prices at other points (which are all shown in Company Exhibit 196) are the results of the application of the demand-mileage allocation.

That natural gas cannot be sold on the basis of many of these gate prices is a matter of which the court will take judicial notice. If The Ohio Fuel Gas Company could get a wholesale price of 50 cents per M c. f. (which is 2 cents per M c. f. greater than the retail rate approved by the court below for the city of Columbus) at all of these other points of wholesale deliveries, it would still suffer an annual loss in revenue of $1,155,535.00 by reason of such allocation.

The computations made on the basis of the so-called "demand-mileage allocation" indicate clearly that such method is discriminatory, favoring those communities located by economic accident close to the company's compressor stations and penalizing those at considerable distances therefrom, entirely out of proportion to the communities' actual requirements for gas transmission investment and operating expenses.

Considering the various community characteristics, such as geographic location, weather variations, possible flood conditions, percentage of gas demand for industrial usage, percentage of heating service saturation, and difference in gas rates, it is easily conceivable that the maximum days' demands of all the towns and cities will not be coincident within any specified 24 hours period, thus creating a definite diversity factor and making im-

possible the development of definite demand-mileage factors.

Even assuming a diversity factor of 1.0, which implies that all maximum demands fall within the same 24 hour period in any year, the determination of the distance, and frequently of the direction in which any specific quantity of gas travels through a series of inter-connected pipe lines supplied from various sources and by several inter-connected compressor stations to a market located within said system, is highly speculative and cannot be reckoned with any reasonable degree of accuracy without the installation of costly measuring devices and equipment, the investment for which and attendant operating expenses would add nothing to the economical or efficient servicing of that market.

The demand-mileage allocation adopted by the court below assumes "the last point of major compression" as the initial point in the travel of the peak day gas to its sundry markets. As applied to the company's business throughout Ohio, and with reference to Columbus in particular, this demand-mileage allocation presupposes that the compressor stations at Wheeler and Treat were located where they are so that they might serve Columbus only. It is obvious from the evidence in the case that their locations were dictated by engineering and economic judgment of the requirements of a growing demand for gas by all the communities served by the entire network of pipe lines of the company and its various sources of gas supply.

Under this demand-mileage allocation, if a compressor station were located immediately adjacent to the city of Columbus, the demand-mileage factor for Columbus would be zero, resulting in none of the "transmission system values and expenses" being apportioned to Columbus.

As has been shown by the evidence, the requirements of practical operation to best serve the needs of the communities reached by The Ohio Fuel Gas Company system involves manipulation of compressor stations and pipe lines in a manner which shifts the center of supply constantly. To establish a fixed "center of production" even within reasonable limits for a twelve months' period is deemed impossible.

It is respectfully submitted that under the record before the court no series of allocation factors developed on a demand-mileage basis can be employed for the reasonable apportionment of the transmission system values and expenses of an inter-connected system such as the one operated by The Ohio Fuel Gas Company, because such a demand-mileage basis involves indeterminable distances of gas travel and estimated maximum days' gas demands, and completely ignores system diversity as affected by non-coincident maximum days' gas usage in the various communities served.

Common experience teaches us that it makes a lot of difference whose ox is being gored. Under the demand-mileage allocation the city of Toledo will have a gate price several times that of the Columbus gate price. The

announcement of the "demand-mileage" allocation doctrine by the court below immediately alarmed some of the other localities in the state, and as a part of our argument here we are adopting what was said by the consulting engineers employed by the city council of Toledo in their report entitled "Gas Rate Study" under date of June 30, 1933, to wit:

> "The court has adjudged that the demand-mileage method is the proper method for determination of the cost of gas at the city gate after having allocated production costs on a sales basis. It will appear then that for the transmission of a definite quantity of gas the cost of transmission will be directly proportional to the distance.
>
> It is very unfortunate that the Ohio Supreme Court found that the demand-mileage method was proper for the determination of the city gate price at Columbus, but did not give us a formula by which this could be applied with precision to other municipalities served by The Ohio Fuel Gas Company. In a system of production and transmission as complex as that of the United Fuel Gas Company and The Ohio Fuel Gas Company, it appears to be impossible to establish any one point as a starting point for mileage measurements. Further, such a method if possible to apply with precision would, on account of Toledo's distance from any reliable supply, react distinctly to Toledo's disadvantage. We have tried fruitlessly to apply such a method and we feel that the results are not only too high to be practicable, but they are not sufficiently trustworthy to become a part of any presentation of fact. Since this case is now before the Supreme Court of the United States, it is possible that there may soon be further light shed upon this particular phase of our problem."

Allocation.

In the East Ohio Gas Company case now pending before the Public Utilities Commission of Ohio, the city of Cleveland and the company have entered into a stipulation—each waiving an allocation under the demand-mileage basis laid down by the court below and agreeing that the allocation shall be made on a volume-sales basis in the same manner that the Public Utilities Commission made the allocation in the instant case.

In the leading article in the January, 1934, number of the Michigan Law Review, Robert D. Armstrong, of the Indianapolis bar, said (p. 289):

> "The recent decision of the Supreme Court of the United States in the so-called Martinsville case has been interpreted by some critics as laying down a 'municipal unit doctrine' of rate-making, denying to a system utility the right to earn from its entire operations a fair return on the value of its entire property, and substituting therefor a 'bundle of rights' to earn in each 'municipality' served a fair return on the value of the property used and useful therefor.
>
> The writer does not share this view of the case."

In a note discussing the Columbus case it is said (p. 324):

> "The Columbus case, like the Martinsville case, was a unit case from the outset. The sole question in connection with which the 'municipal unit doctrine" was discussed was the method by which the system distribution property and expense necessary to bring gas to the various 'municipal gateways' should be apportioned to Columbus. The utility contended for a basis which would give every gateway the same basic cost, while the city contended

for a basis which would reflect the fact that Columbus was closer to the source of supply than other cities served. In upholding the city's contention the court felt called upon to lay down the doctrine that the Constitution of Ohio made the municipality the unit.

Here the court confuses the question of the procedural unit with a question of fact arising in a unit case and entirely unconnected with the question of the unit. Like the Martinsville case, this was a unit case from the beginning and it was not necessary to justify it as such. The city was **a** unit; it was not necessary to prove that it was **the** unit. In a unit case, the extent to which property outside the unit is used and useful in serving it is merely an ordinary question of fact, requiring no 'doctrines' for its solution. It is entirely unrelated to the question for what local unit, if any, the local cost shall be determined. The court seemed to reason, however, that a particular method of apportionment is required by the doctrine that the municipality is **the** unit.

Such is the fascination of a glittering theory that even to trained minds it seems to be the proof of propositions that need no proof, and thus finally is regarded as itself proved."

It is our contention, earnestly urged, that the demand-mileage allocation in and of itself results in a confiscation of property in the instant case.

Under the sub-head **"Deficits"** under III, **Rate of Return** below, we shall show that even if this arbitrary demand-mileage method were to be held valid and the property of The Ohio Fuel Gas Company were to be allocated accordingly to ascertain the gate rate allowed to

appellant for purchased gas, the 48¢ retail rate approved by the court as well as the 55@ retail rate fixed by the commission are each confiscatory.

C. Rate of return for all companies involved will be discussed under the heading "III, **Rate of Return**".

II. A. VALUATION OF APPELLANT'S DISTRIBUTION SYSTEM.

(1) A gas holder valued at $188,742, including the land and equipment was eliminated, notwithstanding it was admitted that it was kept in good condition and full of gas at all times as a reserve supply of gas. (R., 2511.) The commissioners confused the use of the holder with the pressure system of the company, which is not its function, and failed to see its value as a reserve supply of gas, in which capacity the operating men testified it was used and useful and a "very valuable" part of the gas system. (R., 2515; 2521.)

(2) A labor rate substantially less than that actually paid by appellant for the same kind of work in 1929, and still more below the rate paid by the city of Columbus in its water works installations, was used by the commission. The company's labor rate was 45¢ per hour while the commission adopted 40¢. (R., 2491; Co. Ex. 199.)

(3) The labor performance used by city witness Allensworth was adopted by the commission, notwithstand-

ing the only basis he had for it was a hand-book table prepared by a Denver, Colorado, engineer many years ago and published by the LeFax Corporation. (R., Co. Ex. 157-A-B-C-D, R., 2989; City Ex. 66, pp. 44-56; R., 374-378; 444.) Not only was the source of his figures brought out, but it was proved by undisputed evidence that no such labor performance had been secured in the city of Columbus by either the city of Columbus in its water works division, the telephone company in its underground installations, or the gas company. (Co. Ex. 199, filed here as an original exhibit, and testimony at R., 2491, et seq.)

The use of such labor rates and performance caused a reduction in the valuation of $277,561.

(4) No going concern value was included in the rate base. (See I. B (3) hereof.) Although a much larger amount was established by the evidence, if only 10% of the commission's valuation (majority and minority) be added, the rate base is increased $392,765.00.

(5) Working capital, materials and supplies were reduced from the commission's usual allowance of approximately 5% of the value of the property to only 2½%, thereby reducing this allowance $96,382.

(6) General overheads were allowed at only 12½% of the material and labor costs, although the city of Columbus conceded this allowance should be at the rate of 14.4895%. (R., City Ex. 59; R., 3120.) This reduced the commission's own valuation $69,748

(7) No allowance was made for cost of financing,

although the evidence showed that appellant's property could not be reproduced without an expenditure of at least $211,000 for this purpose. (R., 1659; 2733; 2735; 2754; 2758.)

If the foregoing eliminations and reductions be restored to the rate base the "Total Property Used and Useful" of The Columbus Gas and Fuel Company (Majority sheet 1, Ex. C, R., 182; Minority sheet 1, Ex. C, R., 220) becomes $5,263,845 as follows:

Value fixed by commission (Majority and minority)	$4,027,647
Add: Holder station	188,742
Cost of financing	211,000
General overheads	69,748
Working capital, materials and supplies	96,382
Labor rates and performance	277,561
Going concern	392,765
	$5,263,845

The majority commission's "Return at 6½%" (Sheet 1, Ex. C, R., 182) would then be $342,149; the "Total Expenses and Return" would be $3,202,564; and the retail rate required would be 56.46¢ per M c. f. instead of the majority commission's computed rate of 55.049 and allowed rate of 55¢.

With the same addition the minority commissioner's "Total Expenses and Return" (Sheet 1, Ex. C, R., 220) is $2,799,911, and his retail rate becomes 49.39¢ per M c. f. instead of 47.95¢.

II. B. APPELLANT'S OPERATING EXPENSE OTHER THAN GATE PRICE.

(1) Taxes.

The majority commission allowed $42,150 for the payment of state excise taxes by The Columbus Gas and Fuel Company, being 1.35 per cent. of the amount produced by the sale of 5,671,639 M c. f. of gas at 55¢ per M c. f., to wit, $3,122,212 (Sheets 1 and 4 of Exhibit C, R., 182; 184). Prior to the decision by the commission Amended Senate Bill No. 4 was passed by the General Assembly of Ohio as an emergency measure and became effective April 6, 1932. By this act an additional tax of 1% was assessed. Section 4 of said Amended Senate Bill No. 4 provides as follows:

> "For the purpose of providing funds for poor relief and of the carrying out of the other purposes and provisions of this act, a sum in the nature of an excise tax for the privilege of carrying on its intrastate business in the amount of one per centum of the gross receipts of each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling, water transportation, and telegraph company, on its intrastate business from on and after the effective date of this act, as covered by the annual reports required by law to be filed by all such companies as are herein before mentioned in the years 1932, 1933, 1934, 1935, 1936, 1937, is hereby levied and imposed upon each such company in each of said years, such tax to terminate five years after the final date covered by the annual report filed by each of such companies in the year

1932; * * *. The sum so levied to be in addition to the taxes provided for in Sections 5468, 5483, 5485 and 5488 of the General Code, and to be collected on the dates and in the manner provided in said sections."

Section 5483 of the General Code provides as follows:

"In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

The failure of the commission to make allowance for the additional excise tax thus assessed was one of our assignments of error in the Supreme Court of Ohio, but that court made no change in the allowance.

The majority commission allowed $1600 for the payment of public utilities tax, being .05126025 per cent. of said $3,122,212. This tax is assessed under the provisions of Section 606 of the General Code, which provides as follows:

"For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing,

rent, light, heat, water, telephones and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding two hundred thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, **in proportion to the intrastate gross earnings or receipts** of such railroads and public utilities for the year next preceding that in which the assessments are made. * * *"

In arriving at the above amount of $3,122,212 used as the basis of the state excise tax and the public utilities tax, the commission had deducted the sums of $43,980 and $34,469 representing respectively the revenues from minimum charges and discounts and penalties. (Sheet 1, Exhibit C, R., 182.) Both of these taxes are actually based on **gross receipts** and the company is required to pay these taxes thereon, with no deduction for minimum charges or discounts and penalties. This patent error was also called to the attention of the Supreme Court of Ohio and was not corrected.

Correction of the allowances for these taxes increases the "Total Expenses and Return" of The Columbus Gas and Fuel Company from the $3,122,212 to $3,155,318, and makes the rate required under the majority commission's finding 55.63¢ per M c. f. instead of the majority commission's computed rate of 55.049¢, and allowed rate of 55¢.

Due to other differences, principally the difference in gate rate, the minority commissioner based his allow-

ance for excise and public utility taxes on receipts of $2,719,559. He also ignored the 1% additional tax required by Amended Senate Bill No. 4, supra, and deducted minimum charges of $21,990 and discounts and penalties amounting to $34,469 before computing the tax. (Sheet 1, Exhibit C, R., 220.)

Correction of the minority commissioner's allowances for these taxes increases his "Total Expenses and Return" of The Columbus Gas and Fuel Company from the $2,719,559, supra, to $2,748,109, and makes the rate required under the minority commissioner's findings 48.45¢ per M c. f. instead of the minority commissioner's computed rate of 47.95¢.

The majority commission allowed $22,644 for the payment of Federal income taxes, being 12% of the net income produced by its 55¢ rate and computed as follows:

Return allowed (Sheet 1, Exhibit C, R., 182) ...	$261,797
Less net income deductions (interest paid, etc.)	95,739
	$166,058
Federal income taxes ($166,058 ÷ .88— $166,058)	22,644

By Section 13 of the Revenue Act of 1932, effective prior to the commission's decision the income tax rate of appellant was made 13¾% per annum, and the amount which The Columbus Gas and Fuel Company would pay became $26,473, computed as follows:

Return allowed (Sheet 1, Exhibit C, R., 182) ..	$261,797
Less net income deductions (interest paid, etc.)	95,739
	$166,058

Federal income tax ($166,058 ÷ .8625— $166,058) 26,473

The failure of the commission to give effect to this change in tax rate was also called to the attention of the court below but was not corrected.

Correcting this error by adding the sum of $3829 to the $3,155,318, supra, increases the "Total Expenses and Return" to $3,159,147 and makes the rate 55.7¢ per M c. f.

Correcting the same error in the minority commissioner's findings results in a rate of 48.52¢ per M c. f. as against his computed rate of 47.95¢ per M c. f.

The appellant has no alternative. These taxes must be paid. The failure of the commission to allow for them, and of the court to correct the error, results in reducing the amount fixed by both the majority and minority commission as return to $224,862 or 5.58% on the valuation fixed by them of $4,027,647.

The same failure to give effect to increased tax rates, and some additional errors were carried into the amount allowed for the purchase of gas by The Columbus Gas and Fuel Company, or the gate price. The majority commission allowed to The Ohio Fuel Gas Company $282,256 for the payment of excise taxes, being 1.35% of $20,907,842. (Sheet 1, Exhibit B, R., 179.) At the increased rate the amount to be paid is $491,334. Correction of this allowance for excise taxes increases the "Total Expenses and Return" of The Ohio Fuel Gas Company from the $20,907,842 allowed by the majority commission to

$21,116,920, and makes the gate price required 39.41¢ per M c. f. instead of the majority commission's computed price of 39.02¢ and allowed price of 39¢.

The minority commissioner's allowance was computed at 1.35% of $16,985,174 (Sheet 1, Exhibit B, R., 217), or $229,300. Computed at the increased rate of 2.35% this became $339,152. Adding the difference of $169,852 to the minority commissioner's "Total Expenses and Return" of $16,985,174 makes a total of $17,155,026, and requires a price of 32.017¢ per M c. f. instead of the minority commissioner's price of 31.7¢.

For federal income tax the majority commission allowed The Ohio Fuel Gas Company $591,543, being 12% of the net income produced by its 39¢ price and computed as follows:

Return allowed (Sheet 1, Exhibit B, R., 179)	$4,844,988
Less net income deductions (interest paid, etc.)	507,005
	$4,337,983
Federal income tax ($4,337,983 ÷ .88— $4,337,983)	591,543

Two errors occurred here. The commission failed to give effect to the increase in the rate from 12% to 13¾% and also failed to allocate any part of the net income deductions (interest paid, etc.) to the distribution and manufactured gas properties of The Ohio Fuel Gas Company. This deduction was treated as if it all applied to production and transmission property. Correcting these errors the amount of tax to be paid becomes $737,823, computing as follows:

Operating Expense Other Than Gate Rate.

Return allowed (Sheet 1, Exhibit B, R., 179)	$4,844,988
Less net income deductions (interest paid, etc.)	216,827
	$4,628,161
Federal income tax ($4,628,161 ÷ .8625— $4,628,161)	737,823

The correction of this error for income taxes makes the "Total Expenses and Return" of the majority commission $21,263,200, and the gate price required becomes 39.68¢ per M c. f.

The minority commisisoner's allowance for income taxes of The Ohio Fuel Gas Company contained the same errors. He allowed $573,692, being 12% of the net income produced by his 31.7¢ gate price, computed as follows:

Return allowed (Sheet 1, Exhibit B, R., 217)	$4,714,079
Less net income deductions (interest paid, etc.)	507,005
	$4,207,074
Federal income tax ($4,207,074 ÷ .88— $4,207,074)	573,692

Correcting for the increased tax rate and allocating the net income deductions between Production-Transmission and Distribution-Manufactured Gas, makes the correct amount $716,953, computed as follows:

Return allowed (Sheet 1, Exhibit B, R., 217)	$4,714,079
Less net income deductions (interest paid, etc.)	216,827
	$4,497,252
Federal income tax ($4,497,252 ÷ .8625— $4,497,252)	716,953

Operating Expense Other Than Gate Rate.

Correction of this allowance makes the "Total Expenses and Return" of the minority commissioner $17,298,287, and his gate price becomes 32.28¢ per M c. f.

Payment of these increased taxes out of the amount allowed to The Ohio Fuel Gas Company by the majority commission for return, leaves $4,489,630, or a return of 6.02% on the majority commission's valuation of $74,538,280.

Payment of these increased taxes out of the amount allowed to The Ohio Fuel Gas Company by the minority commissioner for return leaves $4,400,966 or a return of 6.06% on the minority commissioner's valuation of $72,524,287.

Applying the corrected gate price of 39.68¢ per M c. f. to the majority commission's allowance for gas purchased by The Columbus Gas and Fuel Company, to wit, 5,955,221 M c. f. at 39.68¢, this allowance becomes $2,363,309. The "Total Expenses and Return" then becomes $3,198,608, and the retail rate required is 56.39¢ per M c. f.

Applying the corrected gate price of 32.28¢ per M c. f. to the minority commissioner's allowance for gas purchased by The Columbus Gas and Fuel Company, to wit, 5,955,221 M c. f. @ 32.28¢, this allowance becomes $1,922,571. The "Total Expenses and Return" of the minority commissioner then becomes $2,796,696, and the retail rate required is 49.311¢ per M c. f.

In respect of United Fuel Gas Company, the allowance for federal income tax by both the majority commission

and the minority commissioner was $70,307, applicable to The Ohio Fuel Gas Company purchases, computed as follows:

Return (Exhibit A; R., 178; 216)	$881,184
Less net income deductions (interest paid, etc.)	365,599
	$515,585
Federal income tax ($515,585 ÷ .88 — $515,585)	70,307

At the increased rate of 13¾% the amount to be paid is $82,195 computed as follows:

Return	$881,184
Less net income deductions (interest paid)	365,599
	$515,585
Tax ($515,585 ÷ .8625 — $515,585)	82,185

Adding the difference of $1888 to the "Total Expenses and Return" of United Fuel Gas Company as allowed by the majority commission (Ex. A; R., 178), makes the amount applicable to The Ohio Fuel Gas Company purchases $3,415,520, which divided by the sales of 15,486,218 M c. f. requires a river price of 22.053¢ per M c. f. instead of the majority commission's 22.04¢.

Applying this river price to the majority commission's allowance to The Ohio Fuel Gas Company for "Purchased Gas—from United Fuel Gas Company" (Sheet 1; Ex. B; R., 179) increases that item to $3,415,520 and increases the "Total Expenses and Return" of The Ohio Fuel Gas Company to $21,265,008.

The gate price of the majority commission then becomes 39.69¢. Applying this gate price to the majority

commission's allowance to The Columbus Gas and Fuel Company for "Purchased Gas—from Ohio Fuel Gas Company" (Sheet 1, Ex. C; R., 182), this amount is $2,364,202 (5,955,221 M c. f. @ 39.69¢). Adding the increase to the above "Total Expenses and Return" increases that item from $3,198,608 to $3,199,501, and the majority commission's retail rate becomes 56.41¢ per M c. f.

Adding the above increase in income tax ($1888) to the "Total Expenses and Return" of United Fuel Gas Company as allowed by the minority commissioner (Exhibit A; R., 216) makes his amount applicable to The Ohio Fuel Gas Company purchases $2,757,360, which divided by the sales of 15,486,218 M c. f. requires a river price of 17.8¢ per M c. f.

Applying this river price to the minority commissioner's allowance to The Ohio Fuel Gas Company for "Purchased Gas—from United Fuel Gas Company" (Sheet 1, Ex. B; R., 217) increases that item to $2,756,227, and increases his "Total Expenses and Return" to The Ohio Fuel Gas Company to $17,299,516. The gate price of the minority commissioner then becomes 32.287¢ per M c. f. Applying this gate price to the minority commissioner's allowance to The Columbus Gas and Fuel Company for "Purchased Gas—from Ohio Fuel Gas Company" (Sheet 1, Ex. C; R., 220), the amount is $1,922,762 (5,955,221 M c. f. @ 32.287¢). Adding the increase to the above $2,796,696 makes the "Total Expenses and Return" of the minority commissioner for The Columbus Gas and Fuel Company $2,796,887, and the retail rate required is 49.313¢ per M c. f.

(2) Load Building Expense.

Both the majority commission and the minority commissioner struck out of Account 422—Salaries, the sum of $23,676.90 paid by The Columbus Gas and Fuel Company, and out of Account 457—Other General Expense, the sum of $6021.48, expended by the home service department of The Columbus Gas and Fuel Company, on the theory that these expenditures were for the sale of appliances and should not have been charged as an expense in the sale of gas. The evidence showed (R., 2815) that the sale of appliances was carried on by a separate company and none of the expense or losses of that company were included in the operating expenses of The Columbus Gas and Fuel Company. The Columbus Gas and Fuel Company does, however, pay for that part of the time devoted by the salesmen to the sale of gas for space heating, and does maintain a home service department for the purpose of encouraging the use of gas. (R., 2820) These are proper and necessary activities for a gas company.

If this $29,298 of expense be restored and added to the above $3,199,501 (majority commission's allowance plus correction for increased taxes) the "Total Expenses and Return" of The Columbus Gas and Fuel Company (Sheet 1, Ex. C; R., 182) becomes $3,228,799 and the retail rate required is 56.92¢ per M c. f.

If the $29,698 of expenses be added to the above $2,796,887 (minority commissioner's allowance plus cor-

rection for increased taxes) his "Total Expenses and Return" for The Columbus Gas and Fuel Company (Sheet 1, Ex. C; R., 220) becomes $2,826,555, and his retail rate is 49.83¢ per M c. f.

(3) Collar Leak Clamps.

Among the items of expense incurred by The Columbus Gas and Fuel Company from time to time is the repair of the joints of steel and iron screw pipe by the installation of what are known as "collar leak clamps." In 1929, the year used as the basis for expense allowances, this amounted to $37,985.82.

There is another kind of clamp known as "hub clamps" which are installed on cast iron pipe, usually at the original laying of the pipe. (R., 2860; 2862.) It has been the practice of The Columbus Gas and Fuel Company to install these "hub clamps" on all cast iron pipe either when laid or whenever the pipe was for any reason uncovered, until in 1929 all the cast iron pipe was so equipped. (R., 2873.) It was in reference to these hub clamps that Judge Hough said in the earlier case in the United States District Court for the Southern District of Ohio, Eastern Division, involving this same property (The Columbus Gas and Fuel Company v. City of Columbus, 17 Fed. (2d), 630):

> "Extensive use of these clamps has been employed in natural gas mains. The question arises, whether this item of value should be classified as a repair or as a permanent improvement or betterment. The

court is inclined to the latter view which is in conflict with the claim of the city and the finding of the master."

Because they are a permanent improvement these **hub clamps** were appraised as part of the pipe and included in the valuation of the property. **Collar leak clamps** on steel and iron pipe were not so treated and were not included in the appraisal, but were set up as an expense.

Both the majority commission and the minority commissioner disallowed this item of $37,985.32 for "collar leak clamp expense" under the mistaken idea that the clamps represented by this expense had been capitalized and included in the appraisal. (R., 171; 211.) Because of the failure to distinguish between the two kinds of clamps and the different methods of treatment thereof, the appellant was denied any allowance for this necessary expense.

If this $37,986 of expense be restored and added to the above $3,228,799 (majority commission's allowance plus correction for taxes and load building expense) the "Total Expenses and Return" of The Columbus Gas and Fuel Company (Sheet 1, Ex. C; R., 182) becomes $3,266,785 and the retail rate required is 57.6¢ per M c. f.

If the $37,986 of expense be added to the above $2,827,376 (minority commissioner's allowance plus correction for taxes and load building expense) his "Total Expenses and Return" for The Columbus Gas and Fuel Company (Sheet 1, Ex. C; R., 220) becomes $2,865,362, and his retail rate is 50.52¢ per M c. f.

(4) Annual Allowance for Depreciation.

In addition to what has been said elsewhere in respect of this allowance the majority commission failed to include its general overhead costs in determining the value of property for which the allowance was computed, although it had depreciated the general overhead costs by the same percentage as the material and labor costs in arriving at the value of the property. No reason was given by the commission for this omission, and there is none, except the general tailoring which the commission had to resort to in order to get its rate down to 55¢ per M c. f.

In respect of The Ohio Fuel Gas Company the commission's general overheads on the property found to require 1½% for annual depreciation amounted to $6,231,-050. At 1½% the annual depreciation on overheads of The Ohio Fuel Gas Company would be $93,466.00. The commission also disregarded general overheads on the property for which the replacement allowance was made (erroneously called "amortization"), to wit: Gas well construction and gas well equipment, with which also belongs production rights of way. The overheads allowed by the commission on these items of property, as depreciated for valuation purposes, amounted to $3,478,-694. At the rate used by the commission the annual allowance on these overheads would be $463,814.

Adding these amounts to the above $21,274,350 makes the majority commission's "Total Expenses and Return"

of The Ohio Fuel Gas Company $21,831,630, and its gate price 40.74¢ per M c. f. Applying this gate price to the majority commission's allowance to The Columbus Gas and Fuel Company for "Purchased Gas—from Ohio Fuel Gas Company" (Sheet 1, Ex. C; R., 182) makes that item $2,436,157.

In respect of The Columbus Gas and Fuel Company the general overheads omitted by the commission in computing the annual allowance for depreciation amounted to $481,800. At the 1½% used by the commission the additional allowance is $5727.00. Adding these increases to the above $3,266,784.00, makes the majority commission's "Total Expenses and Return" for The Columbus Gas and Fuel Company $3,344,466 and its retail rate is 58.96¢ per M c. f.

On the other hand if the commission had allowed the amount of annual depreciation which the city of Columbus conceded, the above increases in the rates would have been greater.

The majority commission allowed $51,154.00 of annual depreciation for The Columbus Gas and Fuel Company. The city conceded at least $88,695.00. (City Ex. 69; R., 3138). The difference is $37,541.00 and the increase in expenses is $31,814.00 instead of the above $5727.00. Adding this difference to the above $3,344,466 makes the majority commission's "Total Expenses and Return" for The Columbus Gas and Fuel Company $3,376,280 and its retail rate 60.39¢ per M c. f.

Operating Expense Other Than Gate Rate.

The minority commissioner allowed $68,196 or $20,499 less than the amount conceded by the city. Adding this difference to the above $2,865,362, makes his "Total Expenses and Return" of The Columbus Gas and Fuel Company, $2,885,861, and his retail rate 50.88¢ per M c. f.

The effect of each of these sundry items of expense not provided for has been separately stated. Combined they increase the rates necessary to produce a 6½% return as follows:

Majority commission's rate		55.00¢ per M c. f.
Taxes—The Columbus Gas and Fuel Company		.70
Taxes—The Ohio Fuel Gas Company		.69
Taxes—United Fuel Gas Company		.02
Load building expense		.52
Collar leak clamp expense		.67
Additional Annual Depreciation Allowance:		
On overheads	1.36	
Additional at amount conceded by city	1.43	2.79
Retail rate required		60.39
Retail rate allowed		55.00
Deficiency		5.39¢ per M c. f.
Minority commissioner's rate		47.95¢ per M c. f.
Taxes—The Columbus Gas and Fuel Company		.58
Taxes—The Ohio Fuel Gas Company		.80
Taxes—United Fuel Gas Company		.002
Load building expense		.52
Collar leak clamp expense		.67
Additional annual depreciation allowance		.36
Retail rate required		50.882
Retail rate found		47.95
Deficiency		2.932¢ per M c. f.

These additional taxes, load building, collar leak clamp and depreciation expenses represent expenditures which appellant must make in order to properly conduct its business. Payment therefor must come out of the amount allowed for return. Deducting the total of the items from the $261,797 ("return" allowed by the majority commission) results in reducing the amount available for return to $31,778 or 76/100 of 1% on the valuation fixed by them of $4,027,647. Deducting the total of the items of taxes, load building and collar leak clamp expense from the $261,797 return allowed by the minority commissioner, reduces his amount available for return to $126,502, or 3.11% on the valuation fixed by him of $4,027,647.

III. RATE OF RETURN.

(1) The court below took "judicial cognizance of the fact that the trend of material and labor cost is downward." (R., 64.) In the consideration of a rate of return the commission and court below erred in reducing both the valuation and the rate of return on account of the succeeding depression and in failing to take notice of the fact that such depression would cause a shrinkage from the 1929 levels in both gross and net operating revenues. The commission used 1929 sales in fixing the rate.

Whereas in Ohio, the valuation of a utility's property is required to be based upon the cost of reproduction new (G. C. 499-9), the rate of return should be constant,

to avoid confiscation of the utility's property. Where the rate base is constant, as in the case of valuations based upon original cost, historical cost, or book value, there may be some justification for a fluctuating rate of return. However, it is submitted that if the court is to take judicial notice of a depression, then judicial notice should also be taken of the fact that in times of depression the use of the utility's service or product is curtailed, with a consequent reduction in revenues, resulting in increased costs per M c. f.

Suppose, for example, that the value of a utility's property be found to be $1,000,000. An 8% return thereon would require that $80,000 be added to operating expenses. As the return bears the relation to operating expenses approximately of 1 to 3, the total operating expenses and return in such case would amount to $320,000 per year.

Assume that the evidence shows that the 1929 sales were 534,000 M c. f.

If, then, we divide the $320,000 by 534,000 M c. f., we will obtain a rate of 60 cents per M c. f.

Assume further that for the five year term succeeding 1929 the sales decreased 25%. Instead of having $320,000 available to pay expenses and return for each year, we will have but $240,000, which is equal to the expense only and leaves nothing for return.

To offset this shrinkage in sales it would require a reduction in operating expenses of 33⅓%, which is not probable. A utility's operating expenses cannot readily

be trimmed. It must stand ready to furnish the product or service if demanded by the consumer. Judicial notice will be taken of the fact that the N. R. A. has increased the expenses of utilities throughout the entire country.

As stated by the commission in its opinion (R., 148):

> "The commission has also been impressed that in a gas plant, more than in any other utility, there is a wide fluctuation between peaks and valleys of consumption due to varied daily and seasonal requirements. An efficient gas system must stand ready to serve the highest demands of severe weather, devoting to that service an investment in development and equipment much beyond that sufficient for the average load from which reliable income is derived.
>
> If the plant were in constant use of its full capacity, the price to the consumer would be less, but the plant must be built to meet the severest requirements, even though much of this capacity may remain in costly idleness during a large portion of the year."

This resultant loss can never be made up because it is a rule of rate-making that past losses are not to be considered in fixing a new rate.

Is it not clear that, when both the rate base and the rate of return are reduced because in the fall of 1929 we were faced with a depression, to predicate a rate upon the assumption that the 1929 sales volume will continue during the depression is bound to result in confiscation?

While the court below made no mention of the rate of

return, it did say under the heading of "Taxes and Overheads":

> "We are not unmindful of the economic conditions which now exist and which have existed since the beginning of this rate case and prior thereto."

The commission, however, said, after discussing the Bluefield case (R., 169):

> "This puts up to the commission a test which, under the present depression, is different from any that has heretofore confronted us. In prosperous times 7 and 8 per cent. and even more were allowed. A gas company is a more hazardous undertaking than is a water company or power company because its whole existence depends upon the continuance of the gas supply and therefore it might be justly said that such a company would be entitled to a greater rate because of the greater risk involved."

In his dissenting opinion the minority commissioner said (R., 206):

> "I likewise realize that the value of the dollar has increased in recent years; * * * and I do feel that the rate of return should somewhat reflect the present trend, the present market and the value of money."

That the commissioner's guess was wrong is established both by the N. R. A. increases in cost of operation and by the devaluation by Congress of the dollar.

In closing this section we desire to revert again for emphasis to the fact that under Ohio law a reproduction cost new less depreciation valuation is required. This

method of valuation provides for the condition contemplated by the commission. When both the rate base and the rate of return are reduced on account of an ensuing depression, the utility is doubly penalized. It is still further penalized when its rates are fixed upon the assumption that the prosperity level of sales will continue.

Insufficient Rate of Return.

(2) In the instant case the court below said:

> "The nature of the natural gas business has been precarious at all times." (R., 67.) "* * * That the product natural gas will eventually die is self-evident." (R., 67.)

In **Bluefield Water Works & Improvement Co. v. Public Service Commission**, 262 U. S., 679, this court, by Mr. Justice Butler, said at page 692:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

In the case of **United Railways v. West**, 280 U. S., 234, this court, by Mr. Justice Sutherland, said at page 251:

> "Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its

credit and enable it to raise money necessary for the proper discharge of its public duties."

Under the rate-making theory obtaining in Ohio there is no opportunity outside of the depreciation reserve to obtain any funds to plow back into the property.

While the statute under which this case was tried (614-46, G. C.—see appendix) contemplates a reasonable rate and makes provision for allowances for "reservations from income for surplus, depreciation and contingencies and such other matters as may be proper, according to the fact in each case," with the exception of an inadequate allowance for depreciation, the statute was not obeyed.

The commission, both majority and minority, sought barely to escape confiscation, or to pass the responsibility for a rate which would escape confiscation to a court.

That the court below made a hurried disposition of the case is apparent from the lack of understanding shown by its opinion as well as by the absence therefrom of any computations.

Under such practice as obtains in Ohio the only way a utility may raise funds for either extensions, betterments or deficits is to borrow money.

Just how any statement or prospectus could be gotten up, even in the absence of the National Securities Act, which would encourage an investor to buy any of appellant's securities on its distribution system is beyond us.

The prospective investor can find a safer and better

paying investment not only in Federal Farm Land Bank 5% tax free bonds guaranteed by the federal government and selling for less than par, but in various national treasury issues.

Appellant has not paid or earned a dividend since 1924. (R., 679.) Appellant has a bond issue of approximately $1,300,000 in default. (R., 2896.) In addition to the bond issue in default, appellant, The Columbus Gas and Fuel Company, has outstanding $6,000,000 of 5% preferred and $3,000,000 of common stock. (R., 678; Co. Ex. 43, p. 4; R., 2900-A.)

It would be impossible to find a reputable investment banker even in good times who would venture the prediction that appellant could be financed with the rate of return allowed in this case.

Indeed, if we were to join appellant with The Ohio Fuel Gas Company, the combined amount of income available for amortization, depreciation, contingencies, surplus and dividends of both companies would amount to less than 8.4% of the combined book costs of their fixed capital. (R., 890; Co. Ex. 43, p. 3; R., 2900-A.)

The amount of income available for amortization, depreciation, contingencies, surplus and dividends of The Ohio Fuel Gas Company alone for the year ending June 30, 1930, amounted to only 10.26% of the book costs of that company's fixed capital. (R., 890; Co. Ex. 43, p. 3; R., 2900-A.)

To say that a 6½% return is adequate for a natural gas producing and transporting company, where no allowance

has been made in expenses for the depletion of wasting assets or for the amortization of facilities or for the expense of delay rentals, where inadequate annual allowances for depreciation and taxes have been made and where no allowances for surplus or contingencies have been made, is to trifle with the facts involved.

To say that a 6½% return on the inadequate valuation of appellant's own property, where actual out of pocket expenses such as increased taxes, load building costs, maintenance and annual depreciation have not been fully provided for, is sufficient to assure confidence in the financial soundness of the utility is to mock common knowledge and to disregard the applicable information contained in any recognized financial publication.

A rate of return is always relative. It depends upon the liberality or parsimony of the valuation and expense allowances. Where these have been liberal, a lower rate of return will not be confiscatory. Where such allowances have been parsimonious even a liberal rate of return may not save the product or service charge from being confiscatory.

It is our earnest contention that even after the proper allowances have been made for both valuation and expenses, appellant and its supplying company (The Ohio Fuel Gas) each needs a return of 8% to insure the stability of its respective business and to prevent confiscation of appellant's property.

(3) Deficits.

The court below said that the book value of leaseholds should be reduced to the book value of the No. 1 only. It is impossible to segregate the book value of the No. 1, but the effect of this holding can be closely approximated by using the value of $1,569,480 admitted by the city and used in City Exhibit No. 115 as the book cost of No. 1 leaseholds.

The court below also held that the transmission property and expenses should be allocated on a demand-mileage basis. While the court made no computations showing the results of its holdings on this or any other phase of the case, the confiscatory character of the decision is shown by applying the allocation factors used by the city's witness, Blundon, since it is obvious they produce the lowest rate possible for Columbus under any method of allocation. After the minority commissioner's valuation and operating expenses have been further reduced by reducing the leaseholds to the city's book cost of No. 1 acreage and by the application of demand-mileage, the rate is still confiscatory.

Proof: The minority commissioner's allowance for expenses and a return at 6½% to The Ohio Fuel Gas Company (Sheet 1, Ex. B, R., 217) was $16,985,174, which is equivalent to 31.7¢ per M c. f. of gas delivered at the city gates. The amount which the company must pay for its lease rentals, no allowance having been made therefor, is $1,684,913, which is equivalent to 3.1447¢ per

M c. f. The amount which the company must spend for additional excise taxes not allowed is $169,852, equivalent to .3170¢ per M c. f. The amount which the company must spend to replace wasting assets (leaseholds, gas wells and equipment) at the rate found by the majority commission, in addition to the amount allowed by the minority commissioner, is $5,499,512, or 10.2642¢ per M c. f. of gas sold. The amount which the company must spend for the West Virginia gas, at the contract price, in addition to the amount allowed by the minority commissioner is $1,417,364 or 2.6453¢ per M c. f. of gas sold. The result is as follows:

Expenditures Not Provided for:		
Lease rentals	3.1447 per M c. f.	
Excise taxes	.3170 per M c. f.	
Replacement of wasting assets	10.2642 per M c. f.	
West Virginia gas	2.6453 per M c. f.	
		16.3712¢ per M c. f.
Price allowed		31.7 per M c. f.
Price required		48.0712¢ per M c. f.
Deficit		16.3712¢ per M c. f.

In other words in order for The Ohio Fuel Gas Company to have a 6½% return on the minority commissioner's valuation, his gate price would have to be 31.7¢ plus 16.3712¢, or 48.0712¢ per M c. f. Instead of the company having a supposed return of 6½%, there is no return at all but an operating deficit of 7.5729¢ for each one thousand cubic feet of gas sold.

The minority commissioner's allowance for expenses and a return at 6½% to The Columbus Gas and Fuel

Company (Sheet 1, Ex. C, R., 220), was $2,719,559 or 47.95¢ per M c. f. of gas sold. When the above gate price is paid for gas purchased with the conceded allowance for unaccounted for gas; when the company pays its increased excise taxes; its collar leak clamp expense and load building expenses, the result is:

Expenditures Not Provided for:		
Gas purchased	17.1897¢ per M c. f.	
Excise taxes	.4895¢ per M c. f.	
Collar leak clamp expense	.6698¢ per M c. f.	
Load building expense	.5178¢ per M c. f.	
		18.8668¢ per M c. f.
Rate allowed		47.95 ¢ per M c. f.
Rate required		66.8168
Deficit		18.8668¢ per M. c. f.

In order for The Columbus Gas and Fuel Company to have a 6½% return on the commission's valuation of its property, approved by the court, the retail rate would have to be 47.95¢ plus 18.8668¢ or 66.8168¢ per M c. f. Instead of a supposed return of 6½%, appellant has no return at all, but an operating deficit of 14.2509¢ for each thousand cubic feet of gas sold.

The application of a demand-mileage allocation, and the reduction of the leasehold value to the city's book cost of No. 1 acreage, do not offset the above deficits. When these two adjustments are made the minority commissioner's valuation of the property of The Ohio Fuel Gas Company becomes $66,808,867. When the demand-mileage allocation is applied to operating expenses and return the above 48.0712¢ gate price becomes 36.9521¢

and The Ohio Fuel Gas Company's gate price deficit is 5.2521¢ per M c. f. (36.9521¢—31.7¢.)

If going concern value be added to the rate base of The Ohio Fuel Gas Company at 10% of the above reduced valuation and a return at 6½% and taxes computed thereon, the 36.9521¢ gate price becomes 37.6043¢ and the deficit is 5.9043¢ per M c. f. Since a 6½% return is equivalent to 6.3114¢ per M c. f. there is available .4071¢ for return, or 43/100 of 1% on the reduced rate base.

The foregoing result is based on an allowance for replacing wasting assets at the rate found by the majority commission. The city conceded an over-all replacement allowance for The Ohio Fuel Gas Company of $2,848,301.74, or 3.6% per annum on the reproduction cost new, exclusive of overheads. (R., 1767.) This was based on an allowance for Gas Well Construction—Account 211, and Gas Well Equipment—Account 212, at the rate of 6.6% per annum. (City Ex. 74, p. 10.) If the city's conceded allowance be substituted for that of the majority commission, the cents per M c. f. required for this purpose is reduced 1.4317¢, the required gate price becomes 36.1726¢, and the deficit is 4.4726¢ per M c. f. This would provide a return on the reduced rate base of 1.92%.

If the amount allowed for West Virginia gas by the majority commission be used, thus adding to the minority commissioner's allowance only the lease rentals paid by United Fuel Gas Company and the depletion-amortization found for that company by the West Virginia com-

mission, the cents per M c. f. required for this item is reduced 1.4169¢, the required gate price becomes 34.7557¢, the rate deficit is 3.0557¢ per M c. f., and the supposedly 6½% return is only 3.40% on the reduced value of the property allocated to Columbus.

Applying these several gate prices to the gas purchased account of The Columbus Gas and Fuel Company that company has no return at all, and its operating deficits are:

At the 37.6043¢ gate price.....Deficit 3.2407¢
At the 36.1726¢ gate price.....Deficit 1.9339¢
At the 34.7557¢ gate price.....Deficit .8689¢

When going concern value is added to the rate base of The Columbus Gas and Fuel Company at 10% of the commission's valuation (majority and minority) and a 6½% return and taxes are computed thereon, the retail rate is increased .5320¢ per M c. f. The above deficits are then 3.7727¢, 2.4659¢ and 1.4009¢ respectively.

These are the results of correcting only part of the many errors of the court below. When correction is made for the failure to allow a fair value of the No. 1 acreage; the failure to allow any value whatever for reserve acreage Nos. 2, 3 and 4; the use of a depletion factor in determining present value of gas wells and equipment; the failure to allow in the rate base anything for cost of organization, cost of financing and incomplete construction; the correction of insufficient allowances for undistributed construction expenditures and working capital; the failure to include in the rate base

the holder tank and equipment of The Columbus Gas and Fuel Company maintained and operated as a reserve supply of gas; and the failure to allow an adequate rate of return; the operating deficits are still more aggravated. If the impossible and confiscatory demand-mileage allocation be discarded, it is impossible to find any return at all and the operating deficits become even more startling.

As confirmatory of the foregoing figures we call the court's attention to the fact that for the years 1927, 1928 and 1929 appellant on its distribution property suffered a loss of $154,188.07 operating under a 48 cent retail rate (R., 680, Co. Ex. 17, R., 2897) in the city of Columbus and higher rates outside of said city. (R., 679.)

During all of this time except the last six months of 1929 appellant was operating under the old gate price (Co. Ex. 12, R., 2884), whereby it paid 65% of the retail rate as the gate price. This made a gate price of 31.20 cents. The evidence shows that everywhere else in the Ohio Fuel Gas system both the retail and wholesale rates were higher than at Columbus. (R., 668; 673.)

Company Exhibit 16 (R., 2896) shows that the average net income of appellant for the 15¾ years from April 1, 1914, to December 31, 1929, was $262,783.95, or an average rate of return of 2.92% on the $9,000,000 of outstanding capital stock. (R., 678.)

IV. THE CONTRACTS BETWEEN RELATED COMPANIES.

This court has held that where the contract clause is involved it will determine for itself what the contract is and whether it has been impaired. **Funkhauser v. Preston**, decided December 4, 1933. 290 U. S., ..., **Beidler v. S. C. Tax Com.**, 281 U. S., 1.

The ownership by Columbia Gas & Electric Corporation of the capital stock of either or all The Columbus Gas & Fuel Company, The Ohio Fuel Gas Company and United Fuel Gas Company did not destroy the distinct corporate entity of any of said companies. **Smith v. Illinois Bell Telephone Co.**, 282 U. S., 144.

Appellant presented its evidence before the commission in conformity with the law as laid down by this court in **United Fuel Gas Company v. Railroad Commission**, 278 U. S., 300, where at page 320 Mr. Justice Stone said:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agree-

ments when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere."

Neither the commission nor the court paid any attention whatever to the contracts.

The contract for the West Virginia gas had been made in conformity with the holdings of the courts of West Virginia, both state and federal, and it is our contention that unless the West Virginia company receives a fair market price, as evidenced by its sales to unrelated companies, for the gas sold to the Ohio company, it is bound to be deprived of its property without due process of law through the regulated rates in either the state of Ohio or the state of West Virginia.

Appellant was required to and did produce evidence of the valuation, revenues and expenses of The Ohio Fuel Gas Company, which was the only source of supply for the Columbus company, and as well evidence of the valuation, revenues and expenses of United Fuel Gas Company, the West Virginia producing company which furnished at the Ohio river part of The Ohio Fuel Gas Company's supply. There was no direct dealing between the Columbus company and the West Virginia company.

In the case of the West Virginia company: a rate case was pending before the Public Service Commission of West Virginia involving the property of United Fuel

Gas Company. The entire record before the West Virginia commission, as well as that commission's findings and the holding of the Supreme Court of Appeals of West Virginia in respect of said proceeding, were introduced under protest and considered by the Ohio commission as the evidence of valuation, revenues, expenses, etc. (R., 141.)

It is our contention that all the evidence submitted showed that the contracts were fair.

The Columbus Supply Contract.

This contract (Co. Ex. 11) will be found at R., 2879.

In 1914, the gas fields of The Columbus Gas & Fuel Company having become insufficient, that company entered into a gas supply contract. (Co. Ex. 12, R., 2884) with the predecessor of The Ohio Fuel Gas Company. These companies were not then related in any manner. The Columbus Gas & Fuel Company was by said contract assured of a firm supply of natural gas at a definite price for a period of ten years, or until April 1, 1924, after which the price was to be dependent upon whether new fields had to be developed and the average additional increase of cost of the natural gas thus obtained.

As was said by the commission in its opinion (R., 144):

> "In the earlier period of service to the city of Columbus, gas was produced by the companies so serving it in the fields of Licking and Knox counties. In later periods a contract was made by the distributing company with The Ohio Fuel Supply

Company and its successors, which producing companies were compelled to resort to some distant points of production, purchasing in West Virginia and Kentucky some of the gas sold to the local company. In the earlier periods of distribution the supply of gas was uncertain, so that the distribution to the consumers in Columbus was insecure. In later years The Ohio Fuel Supply Company and the United Fuel Company have extended their facilities to such an extent that the supply is now certain and dependable."

The evidence showed (R., 668) that if all the gas produced from the 1914 Ohio fields were utilized for Columbus only, leaving nothing for other markets, the supply would not exceed 25 per cent. of the Columbus demand. The evidence further showed that it was necessary for The Ohio Fuel Gas Company to develop other fields, build more pipe lines and compressor stations, at greatly increased costs. (R., 668.)

From 1924 to 1929 there was constant negotiation and litigation between the company and city over the gate price. (Co. Ex. 98, R., 2980.) In 1927 Columbia Gas & Electric Corporation acquired the stock of the Columbus company.

For the purpose of settling both the litigation and the rate question, the city council of Columbus passed on June 3, 1929, and on June 17, 1929, the Columbus company accepted, Ordinance No. 410-29 (Co. Ex. 98, R., 2983) which provided a sliding scale for natural gas from January 1, 1930, of 55¢—60¢—65¢ per thousand cubic feet, with a minimum charge of 75 cents per month.

Thereupon The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company, whose voting stocks were then both owned by Columbia Gas & Electric Corporation, entered into a new supply contract (Co. Ex. 11, R., 2879) fixing a gate price of 45 cents per M c. f. Later, this ordinance was repealed and a 53 cent ordinance enacted, which was defeated on referendum. Then the 48 cent ordinance here involved was enacted.

To sustain the burden resting upon it—that such contract made with a related company was fair and did not unduly siphon any of appellant's profits, appellant established the following facts, to wit:

1. That the Columbus gate price is less than what is justified by consideration of the fair return on the fair value of the property of The Ohio Fuel Gas Company used and useful in supplying the gas to the Columbus company (Co. Ex. 44, p. 3, R., 2907; R., 900 et seq.);

2. That The Columbus Gas & Fuel Company could not produce its own supply of natural gas (R., 665 et seq.);

3. That said Columbus company could not buy its supply of natural gas elsewhere for less (R., 665 et seq.);

4. That the Columbus gate price was fixed only after approximately five years of negotiations (Co. Ex. 74, R., 2946);

5. That the Columbus gate price compares favorably with gate prices throughout the country (R., 668 et seq.; 676; 680 et seq.).

6. The amount of income available for amortization, depreciation, contingencies, surplus and dividends of The Ohio Fuel Gas Company for the year ending June 30, 1930, amounted to only 10.26 per cent. of the book costs of that company's fixed capital. (Co. Ex. 43, p. 3, R., 2900-A; 890.) This evidence was undisputed.

7. The amount of income available for amortization, depreciation, contingencies, surplus and dividends of The Columbus Gas & Fuel Company and The Ohio Fuel Gas Company combined for the aforesaid year amounted to less than 8.4 per cent. of the combined book costs of their fixed capital. (Co. Ex. 43, p. 3, R., 2900-A; 890.) This evidence was uncontradicted.

8. The amount of income available for amortization, depreciation, contingencies, surplus and dividends of all of the related companies composing what was known in the evidence as the "Columbus Group" amounted to but 7.90 per cent. of the book costs of the fixed capital of said group. (Co. Ex. 43, p. 3; R., 2900-A, 890.) This evidence was uncontradicted.

9. That as shown by the bureau of mines statistics and the records of the Public Utilities Commission of Ohio, the average rate for natural gas throughout Ohio was 63.8 cents per M c. f. This evidence was uncontradicted.

10. The Ohio Fuel Gas Company charged The Columbus Gas & Fuel Company less than was charged to unrelated companies for wholesale gas. (R., 668 et seq.) The gate prices at many points, both in and out of Ohio,

were introduced showing that the Columbus gate price was reasonable. (R., 668 et seq.; 676.) This evidence was uncontradicted.

11. That the price charged by United Fuel Gas Company for gas delivered to The Ohio Fuel Gas Company is no greater than charged to unaffiliated customers (uncontradicted), and less than justified by consideration of the return on the fair value of the property of United Fuel Gas Company used and useful in supplying said gas. (Co. Exs. 59 and 80, R., 2920; 2965.)

12. That the United Fuel contract (Co. Ex. 58, R., 2915) was made in conformity with the holdings of the West Virginia commission and the state and federal courts in West Virginia—that said West Virginia company should not charge its related companies less than it charged unrelated companies. (R., 910-912 et seq.)

The commission definitely and specifically excluded all of the foregoing evidence from its consideration. (R., 147.) Such holding was contrary to the holding of this court in the Illinois Bell Telephone case, 282 U. S., 152, where analogous facts were held to have evidentiary value.

Had the commission recognized the Columbus supply contract then the item "Purchased Gas" on Sheet 1 of Exhibit "C" (R., 182; 220) attached to the findings of both the majority and minority would have been $2,679,-849. This would have made the item "Total Expenses and Return" on the majority's Sheet 1 of Exhibit "C" (R., 179) $3,478,213, which divided by 5,671,639 M c. f. sold would have produced a retail rate of 61.3 cents per M c. f.

The same adjustment of the minority's Sheet 1 of Exhibit "C" (R., 220) would make the item "Total Expense and Return" $3,511,608, which divided by 5,671,639 M.c. f. sold would have produced a retail rate of 61.9 cents.

The United Fuel Contract For West Virginia Gas.

This contract (Co. Ex. 58) will be found at R., 2915.

The Ohio Fuel Gas Company produces and purchases most of its supply in Ohio. It purchases the balance of its needs at the Ohio river from United Fuel Gas Company, a related West Virginia corporation. Formerly United Fuel Gas Company discriminated in favor of the Ohio company, but after considerable litigation, some of which will be referred to presently, it entered into a contract whereby it charged the Ohio company the same price which it was charging Hope Natural Gas Company and other unrelated companies. (The Hope contract was introduced in the case at bar as Company Exhibit 59, R., 2920.)

In the case of **United Fuel Gas Co. v. Public Service Commission of West Virginia,** 278 U. S., 322, this court had occasion to examine into the history of the litigation, including the Public Service Commission of West Virginia hearings, of United Fuel Gas Company. One of the questions involved in the various hearings before the commission, before the Supreme Court of Appeals, before the three judges in the District Court and in the case ap-

pealed to this court was the question of discrimination by United Fuel Gas Company in the sale price of gas to its related companies, Columbia Gas & Electric Company and Ohio Fuel Supply Company (which latter company was succeeded by The Ohio Fuel Gas Company).

In the case of **City of Charleston, et al. v. Public Service Commission, et al.**, 95 W. Va., 91, 120 S. E., 398, it appeared that United Fuel Gas Company had been selling natural gas to said Columbia Gas & Electric Company and Ohio Fuel Supply Company, its related companies, at less than it was charging Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, which were unrelated. In that case the court held:

> "8. A natural gas utility should not be allowed to sell its gas to its parent companies at less than its fair market value, and where it does so, in a proceeding to determine gas rates for the utility, it should be treated as receiving a fair market rate for the gas delivered to the parent companies."

Notwithstanding this holding by the Supreme Court of Appeals of West Virginia, this matter continued to be a bone of contention and was raised again before the commission in Case 1516—**Re United Fuel Gas Company**, P. U. R. 1925-B, 705-753. The record in this last case before the commission was introduced as the record before the three-judge District Court in the case of **United Fuel Gas Company v. Public Service Commission of West Virginia**, 14 Fed. (2d), 209, where the question was again raised. This last mentioned case was appealed to this court and decided 278 U. S., 322.

In the case of **United Fuel Gas Co. v. Public Service Commission of West Virginia**, supra, the question of discrimination by United Fuel Gas Company in favor of The Ohio Fuel Supply Company and Columbia Gas & Electric Company (both related companies) was before this court.

It was contended by counsel for United Fuel Gas Company that the court below had erred by adding to the earnings of the appellant the sum of $1,495,496.69 as additional compensation which it was held should have been charged to the Ohio Fuel Supply Company and Columbia Gas & Electric Company for gas sold them in excess of the price actually charged and received.

The 278 official report contains the following from the resumé of the brief for appellees in that case:

> "In adjusting the earnings of the gas company for the year 1923 the commission and the court below added to the earnings as reflected by the company's books the sum of $2,143,661.46 (not $1,495,496.69) on account of the sale of gas to the parent companies, which was equitable and proper. Charleston v. Public Service Commission, 95 W. Va., 91; 120 S. E., 398."

While the point was argued by both sides, this court did not separately discuss this question, but did say:

> "With respect to other conclusions of the court below, there is no serious suggestion that the court below abused its discretion. In 1923 the case was before the highest court of the state. * * * We think it clear that no case is presented which would warrant interference by this court with the order below denying interlocutory relief."

When that case was before the commission (P. U. R. 1925-B, 705) it was stated (p. 711) as one of the questions for determination:

> "VII. What is the annual revenue and annual expense of the gas company, involving what amount of income, if any, the gas company should be charged with receiving from the sales of gas to its parent companies?"

At p. 753 the commission said:

> "Agreeable to the former holdings of this commission and the decision of the Supreme Court of Appeals in Charleston v. Public Service Commission, supra, certain adjustments must be made in these net earnings. We refer * * * to receipts from gas sold by the gas company to its parent companies the Columbia Gas & Electric Company and the Ohio Fuel Supply Company."
>
> (The record in this case was made the record by the court below in the case decided by this court, 278 U. S., 322.)

In addition to introducing the contract between United Fuel Gas Company and Hope Natural Gas Company (Co. Ex. 59, R., 2920), which showed that for similar quantities of gas at similar points of delivery the United was charging the Ohio Fuel the same price that it was charging the Hope and other unrelated companies, various other comparable and higher wholesale prices for gas were introduced. (R., 668 et seq.)

Appellant also introduced Company Exhibit 80 (R., 2965), which showed at page 3 that with the additions at cost to the property of United Fuel Gas Company made

subsequent to the date certain of the West Virginia rate case, with going concern value eliminated, and with book value only for the gas leaseholds, a price of 28.18 cents per M c. f. was justified, whereas the contract price was but 26.5 cents.

Had the commission recognized the contract between United Fuel Gas Company and The Ohio Fuel Gas Company, or had the commission allowed the same price for similar quantities and similar deliveries of gas as was paid by the Hope to the United, to wit, 26.5 cents per M c. f., Sheet 1 of Exhibit "B" (R., 179) attached to the findings of the commission would have shown $4,172,362 instead of $3,413,162 as the gas purchased expense of The Ohio Fuel Gas Company—a difference of $759,200.

V. DUE PROCESS.

Appellant complains that it was not accorded that sort of judicial inquiry to which under the Fourteenth Amendment and the decisions of this court it was entitled.

The court below in the instant case held (R., 68):

> "This court has none other than a supervisory jurisdiction in cases of this character, as provided by Article IV, Section 2, of the Constitution of Ohio, and conferred by Section 544 et seq., General Code."

In 1924 a federal statutory court sitting in Ohio pointed out the erroneous attitude of the Supreme Court

of Ohio in failing to afford "a full judicial inquiry into the facts" to a gas utility in a rate case:

> Van Wert Gaslight Co. v. Public Utilities Commission, 299 Fed., 670 (Donahue, Circuit Judge, and Sater and Hickenlooper, District Judges).

The court set out the constitutional and statutory provisions referred to, and said (p. 674):

> "There can probably be little question that the constitutional provision above quoted and the statutes enacted under it confer upon the Supreme Court judicial power to review all acts of the commission * * *.
>
> "And yet, * * * the Supreme Court of Ohio, * * * apparently held that in such proceedings the plaintiff is not entitled to a full judicial inquiry into the facts, and the independent judgment of the court upon the facts as well as the law * * *.
>
> "This would seem to be a direct denial to the plaintiff utility of that kind of an inquiry to which it was held to be entitled in Bluefield Co. v. Public Service Commission, 262 U. S., 679, 689, * * * following Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S., 287, 289, * * * and cases there cited * * *. So here we are of the opinion that the so-called error proceedings upon the question of valuation, in the Supreme Court of Ohio, did not constitute such a judicial inquiry as was contemplated by the 'due process' clause of the federal Constitution, and, had a federal question then existed, the remedy would have been by writ of error issuing from the Supreme Court of the United States to the Supreme Court of Ohio, as in Ohio Valley Water Co. v. Ben Avon Borough, supra, Bluefield Co. v. Public Service Commission, supra, Southwestern Telephone Co. v. Public Service Commission, supra, and numerous other cases."

The applicable part of Article IV, Section 2, of the Ohio Constitution provides that the Supreme Court shall have

> "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."

Sections 544 and 549 of the General Code of Ohio provide:

> "Section 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."
>
> "Sec. 549. No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court."

By General Code Section 3982 the Legislature delegated to municipal councils the power to regulate from time to time the price which might be charged for natural gas.

When a public utility is dissatisfied with the rate fixed by a municipal council, such utility may proceed under General Code Section 614-44, et seq., which provide for a complaint and appeal to the Public Utilities Commission, with power in said commission, upon hearing, to fix a just and reasonable rate and to substitute the same for the ordinance rate.

The Public Utilities Commission is created by Section 487 of the General Code, which provides in part as follows:

> "Sec. 487. There shall be and there is hereby created a Public Utilities Commission of Ohio and by that name the commission may sue and be sued."
>
> "The Public Utilities Commission is an arm of the Legislature, having such powers as are expressly conferred upon it."
>
> **State ex rel. Public Utilities Commission v. New York Central Railroad Co.**, 115 Ohio St., 477-478.

> "The Public Utilities Commission of Ohio is not a judicial tribunal."
>
> **Helle v. Public Utilities Commission**, 118 Ohio St., 434, Syllabus 1.

> "Rate making as applied to public utility product and service is a legislative function when a governmental agency is given power to fix and determine the rate without the concurrence of the utility."
>
> **Parks v. Cleveland Railway Co.**, 124 Ohio St., 79, Syllabus 2.

On March 8, 1933, while the instant case was pending before the Supreme Court of Ohio, that court decided the case of **Pennsylvania Railroad Co. v. Public Utilities Commission** 126 Ohio St., 260, in which decision the court said at page 262:

> "This court does not substitute its own opinion for that of the Public Utilities Commission on questions of fact. But if this court finds, from a consideration of the evidence, that the commission has

acted unreasonably or unlawfully, its order will be reversed."

In the case of **Ohio Utilities Co. v. Public Utilities Commission** 108 Ohio St., 143, the court in a per curiam said at page 144 (reversed 267 U. S., 359):

"In determining this question, this court is to be guided by the rule laid down in the case of **Village of St. Clairsville v. Public Utilities Commission,** 102 Ohio St., 574, at page 583, in the following language:

'Let us next inquire whether the finding and order are against the weight of the evidence. On this point the inquiry should not be to determine whether there is a scintilla of evidence to support the finding of the commission; but, on the contrary, we are of the opinion that this court should examine the record with a view of determining whether the findings of the commission on the facts are reasonably supported by the evidence adduced at the hearing. Inasmuch as this is the first review of the evidence, the situation of this court in such matters is analogous to that of the Court of Appeals in weighing and reviewing the evidence in an error proceeding from the Court of Common Pleas. Applying such analogy, the findings of the commission should not be disturbed unless they are so manifestly against the weight of the evidence, and so clearly unsupported by it, as to show misapprehension, or mistake, or wilful disregard of duty. This court has not had the opportunity of observing the demeanor of the witnesses, and is therefore not as competent to weigh the evidence as the commission should be.'

And attention is called to the further announcement of this court, to be found in the first proposition of the syllabus of **Hocking Valley Railway Co. v. Public Utilities Commission,** 92 Ohio State, 362:

'This court will not substitute its judgment for that of an administrative board, created pursuant to an act of the Legislature, as to matters within its province. Before the court will interfere with an order of the Railway Commission, or its successors, it must appear from a consideration of the record that the action of the commission was unlawful or unreasonable.'

Applying these principles heretofore announced by this court to the record in the case at bar, * * *."

The foregoing case was reversed by this court, 267 U. S., 359. At page 363, Mr. Justice Sutherland said:

"From the foregoing, it is evident that the state Supreme Court did not accord to the plaintiff in error that sort of judicial inquiry to which, under the decisions of this court, it was entitled."

In the case of **Bluefield Water Works and Improvement Co. v. Public Service Commission**, 262 U. S., 679, Mr. Justice Butler said (p. 689):

"Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts."

In the case of **Ohio Valley Water Co. v. Ben Avon Borough**, 253 U. S., 287, Mr. Justice McReynolds said at page 289:

"Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

"* * * In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. (Citing cases.)

"Here the insistence is that the Public Service Company Law, as construed and applied by the Supreme Court, has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

(P. 290.) Article 6, Public Service Law of Pennsylvania:

'Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The Court of Common Pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court, as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.' (Laws 1913, p. 1429.)

It is argued that this section makes adequate pro-

vision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon the effect or meaning of Sec. 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled 'Practice and Procedure Before the Commission and Upon Appeal.' Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal, (citing cases) but they do not definitely decide the point.

(P. 291.) Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are able to say that Sec. 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the Federal Constitution. On the contrary, after specifying that within thirty days an appeal may be taken to the Superior Court (Sec. 17), the act provides (Sec. 22):

> 'At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law.'

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal, and to make its jurisdiction in respect thereto exclusive. Of this

the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to Sec. 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in Prentis v. Atlantic Coast Line R. Co., supra. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including, of course, Sec. 31), the challenged order is invalid."

In the **Wichita Gas Case**, 290 U. S., .. (decided January 8, 1934), Mr. Justice Butler said:

"And upon the issue of confiscation vel non, they are entitled to the independent judgment of the courts as to both law and facts."

Due process of law has been defined as its regular administration, through courts of justice, by a timely and regular course of proceeding to judgment and execution. As a rule it includes parties, regular pleadings and a trial, according to the settled course of proceedings. It means that a person be brought into court and have the opportunity to prove any fact for his protection. It implies a legal proceeding under the direction of the court.

In the case of Ornstein v. C. & O. Railway Co., 123 Ohio St., 260-263, the court below said:

> " 'Due process' has frequently been defined as follows: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' "

It is respectfully but most earnestly urged that had the court below observed its own definition of "due process" it could not have sustained the minority commissioner's findings and the 48 cent rate provided in the ordinance.

While the court below in the case of **Lykens v. The Public Utilities Commission of Ohio**, 115 O. S., 376, had held that evidence before the commission should be "received under the established and recognized rules for the production of evidence" such established and recognized rules were entirely disregarded in this proceeding.

The commission said (R., 148):

> "The commission has gained some conception through many expert witnesses, having undoubted skill and experience, of results accomplished by the intelligent expenditure of capital in an enterprise whose hope of reward rests upon its ability to furnish to many small consumers a commodity the enjoyment of which is eagerly sought."

Yet the commission predicated its finding of the present value of gas well construction and equipment and the general overheads upon the testimony of J. Paul Blundon whom the record shows to be a young man of

thirty-four years whose educational qualifications we do not challenge but who has had no experience which qualified him to give such testimony as was submitted by him in this case. At page 495 et seq. of the record it will be seen that Mr. Blundon never had any experience of any kind in the natural gas industry nor did he claim to be an expert geologist.

In respect of appellant's distribution property the city presented three witnesses. One of these was a city employee who testified in sur-rebuttal that the water works employed many objects of charity thus attempting to explain why the labor performance in the water works department was so much lower than the city claimed the appellant ought to get in the reconstruction of its distribution plant. The second was a sanitary engineer-contractor with no experience in construction comparable to that in the gas company's mains (R., 455, et seq.) and who could not explain his estimates. (R., 470, et seq.) The remaining witness, Harry R. Allensworth, was shown to be a professional witness with no other means of livelihood and without any experience whatever in the natural gas industry or in any of the subjects upon which he gave testimony. (R., 415, et seq.) Yet this witness who left school at the age of ten years (R., 417) and who never had a moment's experience in any department or phase of the natural gas business (R., 435)—who never had any experience (except as a telegrapher) in any kind of business other than the telephone and police and fire alarm and a limited contact with The

Columbus Railway, Power & Light Company—was permitted to testify in this proceeding, claiming to be an electrical engineer, mechanical engineer (R., 365; 418), mathematician (R., 434; 442; 443), an economist specializing in public utility economics (R., 365) as well as a qualified specialist in the following lines: Finance (R., 365), physics (R., 416) including the fluctuation of electrons (R., 766) and the division of molecules (R., 767), chemistry (R., 415), metallurgy including fatigue of metals (R., 415; 772), crystallization of metals (R., 437), electrolysis and/or corrosion of metals (R., 436; 765), psychology, sociology, accountant (R., 368), auditor (R., 432), designer of gas holders (R., 437), gas pressure expert (R., 2532), expert on soil conditions (R., 436; 760), valuation expert on gas leaseholds, automobiles, furniture and fixtures, miscellaneous structures, pipe of various sizes, meters, regulators, machinery, tools, equipment generally (R., 436; 438; 789; 793; 799), as well as a specialist on the rate of return for utility and non-utility business, rates for money throughout the United States, what constituted a reasonable return for a utility engaged in distributing natural gas,—until finally, when they sought to offer him as a geologist, Acting Chairman Geiger exclaimed (R., 987):

> "Well, now, I think no human being can really know as much as Mr. Allensworth says he does know."

The applicable law is well illustrated in the case of Dr. Delos F. Wilcox, a man of many degrees and wide

experience, but with no actual experience as a builder of street railways or as an auditor. Columbia University had conferred upon him the degree of Doctor of Philosophy. The University of Michigan had conferred upon him the degree of Bachelor of Arts and Master of Arts. He had been connected with various municipalities and rate-making bodies. In fact, it takes several pages in the Third Federal Reporter (Second Series), pp. 290 to 294, to outline Dr. Wilcox's experience, which extended from New York to San Francisco. He did not, however, have any experience as a street railway engineer. **In the case of Westinghouse Electric and Manufacturing Company v. Denver Tramway Company,** 3 Fed. (2d), 285, the court held that Dr. Wilcox was not qualified as an expert in the valuation of a street railway.

In **Re Atlanta Gas Light Company,** P. U. R., 1931-E, 461-478, Dr. John Bauer, who for many years has been prominent as a writer on public utility subjects, made a valuation of the natural gas plant of the Atlanta Gas Light Company for the city of Atlanta. Dr. Bauer testified that he was an economist and accountant and had made studies over a period of years of valuations, rates, et cetera.

Dr. Bauer holds the degree of Bachelor of Arts, Master of Arts and Doctor of Philosophy. The Georgia Public Service Commission held that Dr. Bauer was not qualified to make a valuation of a natural gas plant.

In **Atlas Underwear Company v. City**, P. U. R., 1931-E, p. 403, it was said:

> "Statements by an expert witness not in line with his qualifications as an expert were not admitted in evidence."

The use of these witnesses as experts was assigned as error in the court below. (R., 7, 10, 18.)

We think that the conclusions on questions of fact are so manifestly against the weight of the evidence as to shock the conscience of a reviewing court.

Borrowing from the language quoted with approval in the **O'Fallon case**, 279 U. S., 461-487, the court below should have held that the Public Utilities Commission of Ohio

> "failed to apply the law of the land to facts developed of record."

As we pointed out in our application for rehearing (R., 85) the statements of fact contained in the court's opinion indicate that the court failed to read the record and exhibits.

As we further pointed out in said application for rehearing, the court's conclusions of fact in respect of allocation were contrary to the uncontradicted evidence in the case. (R., 78-79.)

The court below failed to examine the evidence and compute the actual revenues and expenses which by its decision could be received or paid out by The Columbus Gas & Fuel Company and/or The Ohio Fuel Gas Company. Had this been done the resulting confiscatory nature of the court's decision would have been apparent.

VI. TABLE. EFFECT ON RATE OF CORRECTION OF THE ERRORS HEREIN SET OUT.

Operating Expenses.

Additional Cost of Purchased Gas at Contract Price of 45¢:

The contract price (Co. Ex. 11, R., 2897) for gas purchased by The Columbus Gas and Fuel Company from The Ohio Fuel Gas Company at the Columbus gateway is 45¢. The minority commissioner fixed a gate price of 31.7¢. If this contract be found to be reasonable the gate price would be increased..... 13.3 ¢

The cost of gas purchased by appellant will be increased $792,044, which divided by the sales of 5,671,639 M c. f. (allowance being thus made for lost gas) makes an increase in the retail rate of..... 13.9650¢

Depletion of Wasting Assets (Gas Leaseholds, Production Rights of Way, Wells and Equipment at Rate Found by Majority Commission):

The minority commissioner allowed The Ohio Fuel Gas Company $1,765,607 for annual depreciation, being 2½% on $70,624,292. The majority commission

Table.

found that depletion should be allowed on gas wells and equipment and No. 1 leaseholds, on the basis of a remaining life of 3 years and 2 months, or 13.3333% of the reproduction cost new. Only the depleted value of the leaseholds, to wit, 41.8874% of the original value, was included in its computation and no allowance was made for production rights of way. The majority commission's allowance if correctly computed would have been $5,970,328. Crediting this amount with $470,816, being the minority commissioner's 2½% on these four items of property, leaves $5,499,512 to be added to his allowance to replace those wasting assets in three years and two months. Divided by the sales of 53,579,575 M c. f. this increases the gate price ..... 10.2642¢

After allowance for lost gas, this adjustment in the gate price increases the retail rate ..... 10.7774¢

Replacement of Wasting Assets at Rate Conceded by City of Columbus:

The city of Columbus conceded that the wasting assets of The Ohio Fuel Gas Company would have to be replaced at

the rate of 6.6% per year. Applied to gas wells and equipment, leaseholds and production rights-of-way, at the values found by the minority commissioner, this rate would require an annual allowance of $2,955,320. Crediting this amount with $470,816 (the minority commissioner's 2½% on these items of property) leaves $2,484,504 to be added to his allowance to replace these wasting assets. Divided by the sales of 53,579,575 M c. f. this increases the gate price ..... 4.6370¢

After allowance for lost gas, this adjustment in the gate price increases the retail rate ..... 4.8689¢

Amortization of Other Production and Transmission Property (Exclusive of Land) @ 4%:

The minority commissioner's 48¢ rate made no provision for amortization of the production and transmission properties of The Ohio Fuel Gas Company. The evidence sustained an allowance of 4% per year. Applying this rate to the minority commissioner's value of said property (other than the above wasting assets) requires an annual allowance of

Table.

$2,071,664. Divided by the 53,579,575 M c. f. sales, this increases the gate price	3.8665¢
After allowance for lost gas, this adjustment in the gate price increases the retail rate	4.0598¢
Delay Rentals Paid on Reserve Gas Leaseholds:	
The delay rentals paid by The Ohio Fuel Gas Company on its reserve acreage were disallowed as an operating expense. In the year 1929 these payments amounted to $1,684,913. Divided by the 53,579,575 M c. f. of sales, this increases the gate price	3.1447¢
After allowance for lost gas, this addition to the gate price increases the retail rate	3.3019¢
1% Additional Excise Taxes	
The Ohio Fuel Gas Company	
The Columbus Gas & Fuel Company:	
The 1% additional excise tax assessed by the state of Ohio on the gross receipts of The Ohio Fuel Gas Company and not allowed as an expense, amounts to $169-852 on the receipts produced by the minority commissioner's gate price. Divided by the sales of 53,579,575 M c. f., this item increases the gate price	.3170¢

Table.

After allowance for lost gas, this addition to the gate price increases the retail rate	.3328¢
The same additional tax on the receipts of The Columbus Gas and Fuel Company produced by the 48¢ rate, amounts to $27,760, which divided by the sales of 5,671,639 M c. f. increases the retail rate	.4895¢
Additional Cost of West Virginia Gas at Contract Price:	
For the West Virginia gas The Ohio Fuel Gas Company under its contracts with United Fuel Gas Company paid in 1929 $1,417,364 more than was allowed for that purpose by the minority commissioner. Divided by the sales of 53,579,575 M c. f. this increases the gate price.	2.6453¢
After allowance for lost gas this adjustment increases the retail rate.....	2.7776¢
Additional Cost of West Virginia Gas at Majority Commission Rate:	
In arriving at a river price the majority commission allowed the delay rentals paid by United Fuel Gas Company on reserve acreage, and depletion-amortization at the rate found to be necessary by the West Virginia commission. At the price fixed by the majority commission, the cost of the West Virginia gas is	

	Table.
$658,164 more than that allowed by the minority commissioner. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	1.2284¢
After allowance for lost gas, this adjustment increases the retail rate.....	1.2898¢
Load Building Expense:	
The commission disallowed $29,366 expended by The Columbus Gas and Fuel Company for load building. Divided by the sales of 5,671,639 M c. f. this item increases the retail rate.....	.5178¢
Collar Leak Clamp Expense:	
The commission disallowed $37,966 expended by The Columbus Gas and Fuel Company for collar leak clamps. Divided by the sales of 5,671,639 M c. f. this item increases the retail rate.....	.6698¢
Annual Depreciation at Rate Conceded by City of Columbus	
The Ohio Fuel Gas Company	
The Columbus Gas & Fuel Company:	
In City Ex. 74, the city of Columbus conceded an annual allowance to The Ohio Fuel Gas Company for depreciation of $2,848,302. The minority commissioner allowed $1,765,607. The difference of $1,082,695 divided by the sales of 53,579,575 M c. f. increases the gate price..	2.0207¢

Table.

After allowance for lost gas, this adjustment increases the retail rate.....	2.1217¢
For The Columbus Gas and Fuel Company the city conceded an annual allowance of $88,695. The minority commissioner allowed $68,196. The difference of $20,499 divided by the sales of 5,671,639 M c. f. increases the retail rate.....	.3614¢
Additional Annual Depreciation @ 2½% on $10,387,311 (Increased Present Value of Gas Wells and Equipment on Observed Depreciation Basis):	
The gas wells and equipment of The Ohio Fuel Gas Company were depreciated $10,387,311 below their reproduction cost new less depreciation. If this amount is restored, the amount allowed by the minority commissioner for annual depreciation will be increased $259,683. ($10,387,311 x 2.5%.) Divided by the sales of 53,579,575 M c. f. this item increases the gate price.....	.4847¢
After allowance for lost gas, this adjustment increases the retail rate.....	.5089¢

	Table.
Increased Rate of Return on Minority Commissioner's Valuation.	
The Ohio Fuel Gas Company:	
The rate of return allowed was 6½%. At 7% the return allowed The Ohio Fuel Gas Company will be increased $362,621. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	.6768¢
After allowance for lost gas, this adjustment increases the retail rate.....	.7107¢
At 7½% the increase in the gate price is.	1.3536¢
The increase in the retail rate is.....	1.4213¢
At 8% the increase in the gate price is....	2.0303¢
The increase in the retail rate is.....	2.1318¢
Increased Rate of Return on Minority Commissioner's Valuation.	
The Columbus Gas & Fuel Company:	
The rate of return allowed The Columbus Gas and Fuel Company was 6½%. At 7% the return allowed will be increased $20,138. Divided by the sales of 5,671,639 M c. f. this increases the retail price	.3551¢
At 7½% the increase is.....	.7102¢
At 8% the increase is.....	1.0652¢

Table.

Return on Additional Valuation.

Number 1 Acreage at Average of Values Found by Leasehold Witnesses:	
At the average of the several valuation witnesses, the value of the No. 1 acreage of The Ohio Fuel Gas Company was $11,967,129 more than the value allowed therefor. At 6½% the additional return on the increased value is $777,863. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	1.4518¢
After allowance for lost gas this adjustment increases the retail rate.....	1.5244¢
At 7% the increase in the gate price is....	1.5635¢
The increase in the retail rate is.....	1.6417¢
At 7½% the increase in the gate price is.	1.6751¢
The increase in the retail rate is.....	1.7589¢
At 8% the increase in the gate price is...	1.7868¢
The increase in the retail rate is.....	1.8761¢
Number 1 Acreage at Lowest Value Found by Any Leasehold Witness ($39.37 per Acre):	
At the lowest value found by any valuation witness, the value of the No. 1 Acreage of The Ohio Fuel Gas Company was $4,188,817 more than the value allowed therefor. At 6½% the additional return on the increased value is $272,273. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	.5082¢

	Table.
After allowance for lost gas this adjustment increases the retail rate.....	.5336¢
At 7% the increase in the gate price is....	.5473¢
The increase in the retail rate is.....	.5747¢
At 7½% the increase in the gate price is..	.5863¢
The increase in the retail rate is.....	.6156¢
At 8% the increase in the gate price is...	.6254¢
The increase in the retail rate is.....	.6567¢

Reserve Acreage Numbers 2, 3 and 4 at Averages of Values Found by Leasehold Witnesses:

The reserve acreage of The Ohio Fuel Gas Company was not included in the rate base. The average of the values of the several valuation witnesses was $23,752,448. At 6½% the return allowed is increased $1,543,909. Divided by the sales of 53,579,575 M c. f. this increases the gate price	2.8815¢
After allowance for lost gas this adjustment increases the retail rate.....	3.0256¢
At 7% the gate price is increased.....	3.1032¢
The retail rate is increased.....	3.2584¢
At 7½% the gate price is increased.....	3.3248¢
The retail rate is increased.....	3.4910¢
At 8% the gate price is increased.....	3.5465¢
The retail rate is increased.....	3.7238¢

Table.

Reserve Acreage, Numbers 2, 3 and 4, at Lowest Values Found by Any Leasehold Witness:	
At the lowest value found by any valuation witness, the value of the reserve acreage of The Ohio Fuel Gas Company was $15,265,706. Nothing was allowed. At 6½% the additional return on this value is $992,271. Divided by the sales of 53,579,575 M c. f. this increases the gate price	1.8520¢
After allowance for lost gas this adjustment increases the retail rate	1.9446¢
At 7% the gate price is increased	1.9944¢
The retail rate is increased	2.0941¢
At 7½% the gate price is increased	2.1369¢
The retail rate is increased	2.2437¢
At 8% the gate price is increased	2.2793¢
The retail rate is increased	2.3933¢
Going Concern Value at 10% of Valuation Allowed by Minority Commissioner.	
The Ohio Fuel Gas Company:	
No going concern value was allowed. At 10% of the minority commissioner's valuation of The Ohio Fuel Gas Company's property, the increase in return at 6½% is $460,358. Divided by the sales of 53,579,575 M c. f. the increase in the gate price is	.8592¢

	Table.
After allowance for lost gas the increase in the retail rate is.....	.9022¢
At 7% the increase in the gate price is....	.9253¢
The increase in the retail rate is.....	.9716¢
At 7½% the increase in the gate price is.	.9914¢
The increase in the retail rate is.....	1.0410¢
At 8% the increase in the gate price is....	1.0575¢
The increase in the retail rate is.....	1.1104¢
Going Concern Value at 10% of the Valuation Allowed by the Commission.	
The Columbus Gas & Fuel Company:	
Going concern value at 10% of the value allowed by the commission, (Majority and Minority) increases the return of The Columbus Gas and Fuel Company at 6½%, $25,530. Divided by the sales of 5,671,639 M c. f. this increases the retail rate	.4501¢
At 7% the increase in the retail rate is...	.4848¢
At 7½% the increase in the retail rate is.	.5194¢
At 8% the increase in the retail rate is...	.5540¢
Gas Wells and Equipment at Reproduction Cost New Less Observed Depreciation (With Overheads at 14%):	
The gas wells and equipment of The Ohio Fuel Gas Company were valued at $10,387,311 less than reproduction cost new	

	Table.
less observed depreciation. At 6½% the return allowed will be increased $675,175 by the correction of this error. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	1.2601¢
After allowance for lost gas this adjustment increases the retail rate.....	1.3231¢
At 7% the gate price is increased.....	1.3571¢
The retail rate is increased.....	1.4249¢
At 7½% the gate price is increased.....	1.4540¢
The retail rate is increased.....	1.5267¢
At 8% the gate price is increased.....	1.5509¢
The retail rate is increased.....	1.6285¢
Work in Progress—Incomplete Construction:	
The incomplete construction—work in progress of The Ohio Fuel Gas Company was eliminated from the valuation. The amount was $234,295. At 6½% the return allowed will be increased $15,229 by the correction of this omission. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	.0284¢
After allowance for lost gas this adjustment increases the retail rate.....	.0298¢
At 7% the gate price is increased.....	.0306¢
The retail rate is increased.....	.0321¢
At 7½% the gate price is increased.....	.0328¢
The retail rate is increased.....	.0344¢

	Table.
At 8% the gate price is increased.....	.0350¢
The retail rate is increased.....	.0367¢
Cost of Organization:	
No allowance was made for cost of organization. The uncontradicted evidence placed the amount at not less than $1,966,558 (Ford, Bacon & Davis percentage applied to minority commissioner's valuation). At 6½% the return allowed will be increased $127,826 when this omission is corrected. Divided by the sales of 53,579,575 M c. f. this item increases the gate price.....	.2386¢
After allowance for lost gas the adjustment of this item increases the retail rate	.2505¢
At 7% the gate price is increased.....	.2569¢
The retail rate is increased.....	.2697¢
At 7½% the gate price is increased.....	.2753¢
The retail rate is increased.....	.2891¢
At 8% the gate price is increased.....	.2936¢
The retail rate is increased.....	.3083¢
Cost of Financing,	
The Ohio Fuel Gas Company:	
No allowance was made for cost of financing. The undisputed evidence showed that a cost of not less than $3,146,493 would necessarily be incurred in repro-	

Table.

ducing The Ohio Fuel Gas Company's property. (Ford, Bacon and Davis rate applied to minority commissioner's valuation.) At 6½% the return allowed will be increased $204,522 by the correction of this omission. Divided by the sales of 53,579,575 M c. f. this item increases the gate price	.3817¢
After allowance for lost gas the adjustment of this item increases the retail rate	.4008¢
At 7% the gate price is increased	.4111¢
The retail rate is increased	.4317¢
At 7½% the gate price is increased	.4404¢
The retail rate is increased	.4624¢
At 8% the gate price is increased	.4698¢
The retail rate is increased	.4933¢
Cost of Financing,	
The Columbus Gas & Fuel Company:	
The cost of financing which would necessarily be incurred in reproducing The Columbus Gas and Fuel Company was shown to be at least $211,000 by the undisputed evidence. None was allowed. At 6½% the return allowed will be increased $13,715 by the addition of this cost. Divided by the sales of 5,671,639 M c. f., this item increases the retail rate	.2418¢

	Table.
At 7% the retail rate is increased.....	.2604¢
At 7½% the retail rate is increased.....	.2790¢
At 8% the retail rate is increased.....	.2976¢
General Overheads Computed on Minority Commissioner Valuation at the Ford, Bacon and Davis rate for—	
The Ohio Fuel Gas Company:	
Based only on Blundon's inexperienced guess the general overheads were reduced to 14% in respect of The Ohio Fuel Gas Company property. At the rate testified to by Ford, Bacon and Davis, applied to the minority commissioner's valuation, these overheads should have been $1,038,757 more than was allowed. At 6½% the return allowed will be increased $67,519 by the correction of this allowance. Divided by the sales of 53,579,575 M c. f. this increases the gate price.....	.1260¢
After allowance for lost gas the adjustment of this item increases the retail rate	.1323¢
At 7% the gate price is increased.....	.1357¢
The retail rate is increased.....	.1425¢
At 7½% the gate price is increased.....	.1454¢
The retail rate is increased.....	.1527¢
At 8% the gate price is increased.....	.1551¢
The retail rate is increased.....	.1629¢

Table.

General Overheads Computed at the Rate Conceded by the City of Columbus for—

The Columbus Gas and Fuel Company:

Without any evidence the general overheads applicable to The Columbus Gas and Fuel Company were reduced to 12½%. At the rate conceded by the city of Columbus these overheads are $69,459 more than was allowed. At 6½% the return allowed is increased $4515 by the correction of this error. Divided by the sales of 5,671,639 M c. f. this increases the retail rate..... .0796¢

At 7% the retail rate is increased..... .0857¢

At 7½% the retail rate is increased..... .0918¢

At 8% the retail rate is increased..... .0980¢

Working Capital, Materials and Supplies at 5% of Minority Commissioner's Valuation—

The Ohio Fuel Gas Company:

The minority commissioner reduced the allowance to The Ohio Fuel Gas Company for working capital, materials and supplies to $1,841,214 less than the 5% usually allowed for this purpose. At 6½% the return allowed will be increased $119,679 if the 5% is applied. Divided by the sales of 53,579,575 M c. f. this increases the gate price..... .2234¢

	Table.
After allowance for lost gas this adjustment increases the retail rate.....	.2346¢
At 7% the gate price is increased.....	.2405¢
The retail rate is increased.....	.2525¢
At 7½% the gate price is increased.....	.2577¢
The retail rate is increased.....	.2706¢
At 8% the gate price is increased.....	.2749¢
The retail rate is increased.....	.2886¢
Working Capital, Materials and Supplies at 5% of Minority Commissioner's Valuation—	
The Columbus Gas and Fuel Company:	
At the usual rate of 5% the allowance to The Columbus Gas and Fuel Company for working capital, materials and supplies would have been $96,382 more than was allowed. At 6½% the return allowed will be increased $6265 if the 5% is applied. Divided by the sales of 5,671,639 M c. f. this increases the retail rate	.1105¢
At 7% the retail rate is increased.....	.1190¢
At 7½% the retail rate is increased.....	.1275¢
At 8% the retail rate is increased.....	.1360¢

Table.

Gas Holder:

A gas holder maintained and used by The Columbus Gas and Fuel Company as a reserve supply of gas was eliminated from the rate base. The undisputed value of the holder, the land, and equipment was $188,742. At 6½% the return allowed is increased $12,268 when this holder is restored to the valuation. Divided by the sales of 5,671,639 M c. f. this increases the retail rate..... .2163¢

At 7% the retail rate is increased..... .2329¢

At 7½% the retail rate is increased..... .2496¢

At 8% the retail rate is increased..... .2662¢

Labor Rates and Performance:

Based on Allensworth's handbook figures, supported only by the Burgess unitemized estimates, and contradicted by undisputed evidence of actual experience in the city of Columbus, the value of the property of The Columbus Gas and Fuel Company was reduced $277,561 in respect of labor costs. At 6½% the return allowed is increased $18,041 when this unwarranted reduction is corrected. Divided by the sales of 5,671,639 M c. f. this increases the retail rate..... .3181¢

At 7% the retail rate is increased..... .3426¢

At 7½% the retail rate is increased..... .3670¢

At 8% the retail rate is increased..... .3915¢

CONCLUSION.

It is therefore respectfully submitted that the court below erred

(1) In finding that the 48 cent ordinance rate was neither unreasonable, unlawful nor confiscatory (R., 72),

(2) In not finding that the 55 cent rate fixed by the Public Utilities Commission of Ohio was confiscatory, for the reason that each of said rates deprives appellant of its property without due process of law and denies to appellant the equal protection of the law, contrary to the provisions of Section One of Article Fourteen of the articles in addition to and amendment of the Constitution of the United States.

(3) In holding that Sections 4 and 5 of Article XVIII of the Constitution of Ohio and Sections 614-46; 499-8; 499-9; 499-13; 614-49 and 614-50 of the General Code of Ohio are valid and do not deprive appellant of its property without due process of law, and do not deny to appellant the equal protection of the law contrary to the provisions of Section One of Article Fourteen of the articles in addition to and amendment of the Constitution of the United States, which Ohio Constitution and statutes are interpreted by said court as:

(a) Requiring the allocation of transmission property and expenses on a demand-mileage basis but permitting the allocation of production property and expenses and general property and expenses on a sales basis;

(b) Forbidding any allowance in rates fixed thereunder of any return upon the value of gas leaseholds not yet drilled but owned and used as the source of supply of natural gas, and indispensable to the continuance of the business;

(c) Forbidding any allowance for depletion of wasting assets, and particularly gas leaseholds and gas wells and the equipment therein (Accounts Nos. 211 and 212);

(d) Forbidding any allowance in rates fixed thereunder for amortization of the property of a natural gas production and transmission company; and

(e) Forbidding any allowance for rentals actually paid on gas leaseholds not yet drilled but held, owned and used as the source of supply of natural gas, and indispensable to the continuance of the business.

It is further respectfully submitted that the court below erred

(4) In not sustaining and upholding as valid the contract (Co. Ex. 11, R., 2879) between The Ohio Fuel Gas Company and appellant for appellant's supply of natural gas at the Columbus gate,

(5) In not sustaining and upholding as valid the contract (Co. Ex. 58, R., 2915) between United Fuel Gas Company and The Ohio Fuel Gas Company for gas purchased from United Fuel Gas Company at the state line (Ohio river),

for the reason that the 48 cent ordinance rate approved by the court and the 55 cent rate fixed by the Public

Conclusion.

Utilities Commission of Ohio each impair the obligation of each of said contracts, contrary to the provisions of Section Ten of Article One of the Constitution of the United States.

Respectfully submitted,

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Counsel for Appellant.

Columbus, Ohio.
February 17, 1934.

APPENDIX.

Constitution of the United States, Article I, Section 10:

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. * * *"

Constitution of the United States, Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Code, Title 26, Section 23 (1) (Revenue Act of 1932):

"(1) Depletion — In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the commissioner, with the approval of the secretary. * * *"

Constitution of the State of Ohio, Article IV, Section 2:

"The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. * * * "

Constitution of the State of Ohio, Article XVIII, Secs. 4 and 5:

"Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

"Section 5. Any municipality proceeding to ac-

quire, construct, own, lease or operate a public utility or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

General Code of Ohio, Section 487:

"There shall be and there is hereby created a public utilities commission of Ohio and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the Senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. * * * "

General Code of Ohio, Section 499-8:

"The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. * * * "

General Code of Ohio, Section 499-9:

"The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

* * * * * * * * * * * * * *

(B) The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

* * * * * * * * * * * * * *

(D) The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

(E) Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

(F) The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

(G) If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

* * * * * * * * * * *

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the governor and the General Assembly."

General Code of Ohio, Section 499-13:

" * * * Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act."

General Code of Ohio, Section 499-14:

"The commission shall have power to establish a system of accounts to be kept by the public utilities or railroads (including municipally owned or operated utilities) or to classify said public utilities or railroads and to establish a system of accounts for each class, and to prescribe the manner in which such accounts shall be kept; and such system shall when practicable conform to the system prescribed by the Tax Commission of Ohio. It may also in its discre-

tion prescribe the forms of accounts, records and memoranda to be kept by such public utilities or railroads, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys, and any other forms, records and memoranda which in the judgment of the commission may be necessary to carry out any of the provisions of this chapter. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it shall not be inconsistent, in the case of corporations subject to the provisions of the act of Congress entitled 'An act to regulate commerce' approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto, with the systems and forms from time to time established for such corporations by the interstate commerce commission, but nothing herein contained shall affect the power of the commission to prescribe forms of accounts, records and memoranda covering information in addition to that required by the interstate commerce commission. The commission may, after hearing had upon its own motion or upon complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. Where the commission has prescribed the forms of accounts records or memoranda to be kept by any public utility or railroad for any of its business, it shall thereafter be unlawful for such public utility or railroad to keep any accounts, records or memoranda for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, excepting such accounts, records or memoranda as shall be explanatory of and supplemental to the accounts, records or memoranda prescribed by the commission. The commission shall at all times have access to all accounts kept by such utilities or railroads and may

designate any of its officers or employes to inspect and examine any and all such accounts. It shall be the duty of the auditor or other chief accounting officer of any such utility to keep such accounts and make the reports provided for in Section 614-48 of the General Code. Whoever being such auditor, or chief accounting officer, violates or fails to comply with the provisions of this section shall upon conviction thereof be subject to the penalties provided for in Section 614-65 of the General Code. It shall be the duty of the attorney general to enforce the provisions of this section upon request of the commission, by mandamus or other appropriate proceedings."

General Code of Ohio, Section 544:

"A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

General Code of Ohio, Section 545:

"The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the Supreme Court, by any party to the proceeding before the commission, against the Public Utilities Commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error."

General Code of Ohio, Section 546:

"Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court."

General Code of Ohio, Section 549:

"No court, other than the supreme court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court."

General Code of Ohio, Section 614-44:

"Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of Secs. 3644, 3982, and 3983 of the General Code between the municipality and such public utility with respect to the rate, price, charge, toll or rental to be made, charged, demanded, collected or exacted, for any commodity, utility or service by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in Sections 3644, 3982 and 3983 of the General Code. Thereupon the commission, upon complaint in writing, of such public utilities or upon complaint of one percentum of the electors of such municipal cor-

poration, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of. * * * Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day. The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses."

General Code of Ohio, Section 614-46:

"If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration for the grant of such franchise or right; and exclusive of

any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance is just and reasonable, and ratify and confirm the same.

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product during such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. If the commission, after the hearing provided for in Sections 614-44 and 614-46 of the General Code shall be of the opinion that any provisions of the ordinance appealed from or complained of other than the rate, price, charge, toll or rental fixed thereby are or will be unjust or unreasonable or that the form and structure of the rate, price, charge, toll or rental fixed thereby may be unfair or unreasonable, or may have

the effect of causing any rate, price, charge, toll or rental to be fixed by the commission to become unfair or unreasonable, the commission shall in its order strike out such unjust or unreasonable provisions, conditions, form and structure of said ordinance and shall substitute therefor, if it deem it necessary such provisions and conditions as it may consider fair and reasonable, and make such changes in the form and structure of the rate, price, charge, toll or rental fixed in such ordinance as it may consider fair and reasonable."

General Code of Ohio, Section 614-49:

"Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the commission after investigation shall determine that a depreciation account can be reasonably required. The commission shall ascertain, determine and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation from time to time as it may find necessary."

General Code of Ohio, Section 614-50:

"The moneys for depreciation charges thus provided for shall be set aside out of the earnings and carried as a depreciation fund. The moneys in such fund may be expended in new construction, extensions or additions to the property of the public utility, or invested, and if invested, the income from the

investment shall also be carried in the depreciation fund. Such fund and the proceeds thereof, may be used for the purpose of renewing, restoring, replacing or substituting depreciated property in order to keep the plant in a state of efficiency. Such fund and the proceeds or income therefrom shall be used for no purpose other than as provided in this section, except upon the approval of the commission."

General Code of Ohio, Section 3982:

"The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them."

General Code of Ohio, Section 3983:

"If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

Geneal Code of Ohio, Section 504-2:

"No railroad as defined in Section 501 of the General Code, operating any railroad in the state of Ohio, and no public utility as defined in Section 614-2a of the General Code furnishing service or facilities within the state of Ohio, shall abandon or be required to abandon or withdraw any main track or tracks or depot of a railroad or main pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, or any portion thereof, pumping station, generating plant, power station, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened and used for public business, nor shall be closed for traffic or service thereon, therein or thereover, except as provided in Section 504-3. Any railroad or public utility violating the provisions of this section shall forfeit and pay into the state treasury not less than one hundred ($100.00) dollars, nor more than one thousand ($1000.00) dollars; and shall be subject to all other

legal and equitable remedies for the enforcement of the provisions of this act."

General Code of Ohio, Section 504-3:

"Any such railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn or closed for traffic or service all or any part of such main track or tracks, or depot, and any such public utility, or political subdivision desiring to abandon or close, or have abandoned, withdrawn or closed for traffic or service all or any part of such line or lines, pumping stations, generating plant, power station or service station, shall first make application to the Public Utilities Commission in writing who shall thereupon cause reasonable notice thereof to be given, stating the time and place fixed by the commission for the hearing of said application * * *."

Uniform Classification of Accounts, prescribed by the Public Utilities Commission of Ohio, Section 360:

"Rentals on Unoperated Leases—

Charge to this account the amount of rent accrued during each accounting period on gas leases which are being held by the utility for future production of natural gas.

The records supporting the entries to this account shall be so kept that the utility can furnish information for each lease as to the name of the lessor and a description of the land leased by him; the period and the terms of the lease including the amount of rent payable thereunder; whether such lessor controls, is controlled by, or is in any way affiliated with the utility; whether the rent is payable in cash or is disbursed by the utility for the lessor as interest on funded debt, guaranteed dividends on stock or otherwise."

General Code of Ohio, Section 5483:

"In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

Section 4 of Amended Senate Bill No. 4:

"For the purpose of providing funds for poor relief and of the carrying out of the other purposes and provisions of this act, a sum in the nature of an excise tax for the privilege of carrying on its intrastate business in the amount of one per centum of the gross receipts of each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling, water transportation, and telegraph company, on its intrastate business from and after the effective date of this act, as covered b ythe annual reports required by law to be filed by all such companies as are herein before mentioned in the years 1932, 1933, 1934, 1935, 1936, 1937, is hereby levied and imposed upon each such company in each of said years, such tax to terminate five years after the final date covered by the annual report filed by each of such companies in the year 1932; * * *. The sum so levied to be in addition to the taxes provided for in Sections 5468, 5483, 5485 and 5488 of the General Code, and to be collected on the dates and in the manner provided in said sections."